United States Court of Appeals

for the Second Circuit

APPENDIX

77-2133

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2133

ROBERT J. ENRIGHT,
Petitioner-Appellee,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

UNITED STATES COURT OF APPEALS
FILED
DEC 20 1977
SECOND CIRCUIT

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JUDGE MEDINA

74 CR 1152

plone in

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT J. ENRIGHT,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

74 Cr. 1152

(CMM)

~~NOTICE OF~~ MOTION TO VACATE SENTENCE UNDER 28 U.S.C. §2255

---X

TO: Hon. Robert B. Fiske, Jr.
United States Attorney for the Southern District of New York, Attorney for Respondent
1 St. Andrews Plaza
New York, New York

PLEASE TAKE NOTICE THAT upon the annexed affidavit of petitioner Robert J. Enright, which contains all relevant information required by Rule 2 of the Rules Governing Proceedings Under 28 U.S.C. §2255, the undersigned will move this Court, upon a date to be set by this Court as provided by the provisions of Rule 4 of the Rules Governing Proceedings under 28 U.S.C. §2255, for an order pursuant to 28 U.S.C. §2255 vacating the sentence imposed upon petitioner on Indictment Number 74 Cr. 1152, and dismissing said indictment with prejudice.

Susan N. Herman

SUSAN N. HERMAN
PIERCE J. GERETY
PRISONERS' LEGAL SERVICES OF NEW YORK
Attorneys for Petitioner
100 Church Street
New York, New York 10007
(212) 285-0570

A 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ROBERT J. ENRIGHT,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

74 Cr. 1152

(CMM)

AFFIDAVIT IN SUPPORT OF MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. §2255

----------X

STATE OF NEW YORK)
: SS.:
COUNTY OF WYOMING)

ROBERT J. ENRIGHT, being duly sworn, deposes and says:

1. That he is the petitioner in the above-styled proceeding and makes this affidavit in support of his motion to vacate sentence pursuant to 28 U.S.C. §2255.

2. That he is presently in federal custody under a sentence of imprisonment imposed by this Court on March 26, 1975, upon conviction for violation of 18 U.S.C. §§2113(a) and (d), under Indictment Number 74 Cr. 1152, the term of the sentence being 20 years on each count, to run concurrently. A copy of the judgment is attached hereto as Exhibit A. Petitioner is presently incarcerated at the Attica Correctional Facility, serving this federal sentence concurrently with a sentence imposed by the courts of New York State, and a sentence imposed by the United States District Court for the Eastern District of New York.

3. Petitioner claims the right to have the sentence imposed by this Court set aside on the ground that sentence was imposed in violation of the laws of the United States, and that the Court had no jurisdiction to impose said sentence. Spe-

cifically, petitioner contends that the sentence was imposed in violation of Article IV(e) of the Interstate Agreement on Detainers, 18 U.S.C. App. (1970).

4. The facts upon which this claim is based are as follows:

a) On May 29, 1974, while petitioner was in the custody of the New York State Department of Correctional Services, incarcerated at the Green Haven Correctional Facility and serving a sentence imposed by the courts of New York State, petitioner was taken into federal custody and thereafter required to submit to a line-up. At the line-up, petitioner was identified as a participant in a bank robbery which allegedly took place on July 19, 1973. Petitioner was returned to the Green Haven Correctional Facility on June 14, 1974.

b) On October 30, 1974, Magistrate Sol Schreiber of the United States District Court for the Southern District of New York issued a warrant, Magistrate's Docket Number 1348, authorizing arrest of petitioner for prosecution, in the Southern District of New York, upon a complaint charging violation of 18 U.S.C. §2113(a). A copy of this warrant is attached hereto as Exhibit B.

c) Upon information and belief, this arrest warrant was lodged as a detainer with the office of the Head Clerk at the Green Haven Correctional Facility, Stormville, New York, on November 15, 1974. See Exhibit C, a copy of a letter from the Head Clerk at the Attica Correctional Facility, and Exhibit D, a document petitioner was given with pretrial discovery material, which he believes to be a report by the Federal Bureau of Investigation.

d) Upon information and belief, this warrant was not withdrawn until after March 26, 1975, at which time it was replaced by a commitment detainer. See Exhibit C.

e) From November 15, 1974, until approximately December 2, 1974, petitioner was not advised of the lodging of this federal arrest warrant or of it contents, in violation of Article III(c) of the Interstate Agreement on Detainers, 18 U.S.C. App. (1970). At no time before trial was he advised of his rights under the Agreement.

f) On December 15, 1974, petitioner wrote to Hon. Sol Schreiber requesting a speedy trial on the charge of violating 18 U.S.C. §2113(a). A copy of this letter is attached hereto as Exhibit E.

g) On December 10, 1974, Indictment Number 74 Cr. 1152 was filed in the Southern District of New York, charging petitioner with violations of 18 U.S.C. §§2113(a) and (d). On December 18, 1974, a bench warrant was issued upon this indictment.

h) On December 24, 1974, Assistant United States Attorney Jeffrey I. Glekel caused to be filed an affidavit requesting this Court to issue a writ of habeas corpus ad prósequendum, directing the Warden of the Green Haven Correctional Facility to surrender petitioner to the custody of a federal marshal, and directing the federal marshal to produce petitioner in the United States District Court for the Southern District of New York, upon Indictment Number 74 Cr. 1152 and "after the said defendant has been discharged or convicted and sentenced on said indictment, to return him to the Green Haven Correctional Facility." A copy of this affidavit is attached hereto as Exhibit F. A writ of habeas corpus ad prosequendum was duly issued by Hon. Robert L. Carter, dated December 20, 1974, returnable December 30, 1974.

A copy of this writ is attached hereto as Exhibit G.

i) The writ of habeas corpus ad prosequendum was served on the Warden of the Green Haven Correctional Facility on December 27, 1974 by Deputy U.S. Marshal R.A. Bryant, who took custody of petitioner Robert J. Enright at Green Haven on that date, and delivered petitioner to the Federal Detention Headquarters at 427 West Street, New York, New York on that same date. See Exhibit H (the endorsement on the writ constituting Exhibit G), attached hereto.

j) On December 30, 1974, petitioner appeared in open court in the United States District Court for the Southern District of New York, with his attorney, and a plea of not guilty was entered on his behalf. The writ of habeas corpus ad prosequendum was adjourned, by Hon. Thomas P. Griesa, to January 13, 1975, and the proceedings on Indictment Number 74 Cr. 1152 assigned for all purposes to Hon. Charles M. Metzner. The writ was marked as satisfied on January 24, 1975, by Hon. Marvin E. Frankel. See Exhibit H.

k) On January 28, 1975, petitioner was returned by Deputy U.S. Marshal Robert J. Meli to the custody of the New York State Department of Correctional Services, at Green Haven Correctional Facility, without having stood trial on Indictment Number 74 Cr. 1152. See Exhibit H.

l) On February 11, 1975, Assistant United States Attorney Glekel caused to be filed an affidavit requesting the issuance of another writ of habeas corpus ad prosequendum, directed to the Warden of the Green Haven Correctional Facility, returnable February 24, 1975. The writ was duly issued on

February 11 and served on the Warden of Green Haven thereafter, but was returned unexecuted because petitioner had been transferred from Green Haven to the Attica Correctional Facility.

m) On February 20, 1975, Assistant United States Attorney Glekel caused to be filed a third affidavit requesting issuance of a writ of habeas corpus ad prosequendum, directed to the Warden of the Attica Correctional Facility. The writ was duly issued on February 20, 1975, returnable February 24, 1975. A copy of this affidavit and writ is attached hereto as Exhibit I.

n) Pursuant to this writ, petitioner was again taken into federal custody and, while in federal custody, from February 24, 1975 to February 26, 1975, petitioner stood trial on Indictment Number 74 Cr. 1152. He was convicted on February 26, 1975, and sentenced upon this conviction by this Court on March 26, 1975.

o) Petitioner was returned by the U.S. Marshal to the Attica Correctional Facility on April 3, 1975. Upon information and belief, the federal warrant of arrest lodged in petitioner's prison file was thereupon withdrawn, and was replaced by a commitment detainer on April 10, 1975. See Exhibit C.

5. Because petitioner was transferred from state to federal custody to stand trial on federal Indictment Number 74 Cr. 1152 and was thereafter returned to state custody without having stood trial on said indictment, on January 28, 1975, federal Indictment Number 74 Cr. 1152 lost all force and effect, pursuant to Article IV(e) of the Interstate Agreement on Detainers, 18 U.S.C. App. (1970), as is more fully set forth in petitioner's memorandum of law, attached hereto.

6. No previous application for the relief requested herein has been made to this or any other court.

WHEREFORE, petitioner prays that this Court grant his motion to vacate sentence and enter an order dismissing with prejudice Indictment Number 74 Cr. 1152, and for such other and further relief as may seem to the Court just and proper.

Sworn to before me this
21 day of January, 1977.

NOTARY PUBLIC

DANIEL J. COSP
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978

A 8

Defendant | Robert W. Ratcliffe | DOCKET NO. | 71 Cr. 3352

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date | MONTH: Dec. | DAY: 13 | YEAR: 1971

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL Gordon Ely Dee (Name of counsel)

PLEA

The defendant having been produced in Court on writ of Habeas Corpus ad Prosequendum

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea. ☐ NOLO CONTENDERE, ☐ NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of ☐ NOT GUILTY. Defendant is discharged ☐ GUILTY.

Defendant has been convicted as charged of the offense(s) unlawfully, wilfully and knowingly, by force, violence and intimidation did take and attempt to take from the person and presence of others, money and property which was in the care, custody, control, manage and possession of a bank which was insured by the Federal Deposit Insurance Corporation (Title 18, United States Code, Section 2113(a).) and did assault and put in jeopardy the lives of persons by the use of dangerous weapons (Title 18, U.S.C., Sec. 2113(d).)

The court asked whether defendant had anything to say and, it appearing no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that the defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

SENTENCE AND PROBATION ORDER

TWENTY(20)YEARS on each of counts (1) and (2) to run consecutively with each other.

It is recommended that the Attorney General pursuant to Section 4208 of Title 18, United States Code, arrange to have this sentence served concurrently with the time due the defendant for the parole violation and for the escape provision, in so far as this time can be served concurrently can be served.

It is the Attorney General agree with this recommendation the balance of this sentence if any, will be served in a Federal Institution to be designated by him.

COMMITMENT ORDER

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

CERTIFIED AS A TRUE COPY

ATTEST:

CLERK, U.S. DISTRICT COURT

By _____ Deputy Clerk

CHARLES H. TUTTLE

U.S. DISTRICT JUDGE

GENERAL CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall, during the period of probation, conduct himself as a law-abiding, industrious citizen and observe all conditions of probation prescribed by the court. TO THE DEFENDANT — You shall:
(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);
(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any change in your place of residence;
(6) follow the probation officer's instructions and report as directed.
The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

Executed this Judgement & Commitment by lodging a copy with the Warden of Attica Corr. Fac. at Attica, NY and by forwarding a copy to the Bureau of Prisons Reginal offie at Phila., Pa. And also forwarding copies to the USM at Buffalo, NY.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

United States Marshal
Southern District New York

_____
United States Marshal.

By _____
Deputy Marshal.

A 10

A 11

STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES
ATTICA CORRECTIONAL FACILITY
ATTICA, N.Y. 14011

HAROLD J. SMITH
SUPERINTENDENT
Superintendent

January 5, 1977

JAN 7 1977
P. L. S. OF NEW YORK

Ms. Susan Herman
Staff Attorney
100 Church Street
New York, New York 10007

Re: Robert Enright
29602

Dear Ms. Herman:

With reference to your letter of December 15, 1976, our records indicate that a warrant dated November 30, 1974 charging the above named inmate with violation with U.S.C. Title 18, Section 2113A from the Southern District of New York was lodged against the inmate on November 15, 1974 at Green Haven Correctional Facility. He was sentenced on this charge on March 26, 1975 and the original warrant was withdrawn. The commitment detainer was put in its place.

On January 29, 1975 while confined at Green Haven Correctional Facility warrants from the Eastern District of New York, Docket Number 74-CR-735, 74-CR-793 and 74-CR-792 charging Enright with Armed Bank Robbery were lodged against him. These warrants still remain on file.

On July 1, 1975 while confined here a judgment and commitment from the Eastern District of New York Docket Number 75-CR-169 dated May 23, 1975 sentenced him to a term of 10-0-0 concurrently for the crime of Violation of T-18 US Code Section 2113B was filed against him.

In accordance with your request I am attaching hereto copies of the commitment detainers and warrants on file at this time against the above named inmate.

Very truly yours,

HAROLD J. SMITH
SUPERINTENDENT

By: Doris M. Deitz

Doris M. Deitz
Head Clerk

DMD/ofl
Attach.

On October 28, 1974, the New York Office of the Federal Bureau of Investigation (FBI) was informed that ROBERT JOSEPH ENRIGHT and , had escaped from Green Haven State Penitentiary on October 26, 1974.

On October 30, 1974, Assistant United States Attorney (AUSA) JEFFREY GLEKEL; Southern District of New York (SDNY) authorized prosecution of ENRIGHT for violation Title 18, United States Code, Section 2113 (a) and (d), (National Bank of Westchester, Mount Vernon, New York, July 19, 1973). An authorized complaint was filed by Special Agent (SA) before United States Magistrate SOL SCHREIBER and a Federal warrant issued the same date.

On November 9, 1974, ENRIGHT was apprehended in Queens, New York by the New York State Police and immediately returned to the Green Haven State Penitentiary. The aforementioned Federal warrant has been filed by the United States Magistrate, SDNY, as a detainer.

A 13

55

Give Inmates Full Name And Number [illegible]

Name Hon. Sol. Schneider
Street & No. Southern Dist. - Foley Square
City New York State N.Y. [ZIP CODE]

DRAWER B
STORMVILLE, N. Y. 12582

Date 12-15-74

STAGE
55

Your Honor,

Being a layman at [illegible], it is my [illegible] would that this letter as a motion for a [illegible] [illegible] as [illegible] by law. I've attempted to get the proper [illegible], but as of this date I have been unable to do so. Thank you for your time and trouble.

Respectfully Yours
Robert A. [illegible]
[illegible]

The warrant [illegible] [illegible] in violation of USC Title 18 section 2113(a) ✓

That the case is now on the calendar of the United States District Court for the Southern District of New York for the entry of a plea and it is necessary that the defendant appear and enter a plea.

WHEREFORE, your deponent respectfully prays that a writ of habeas corpus ad prosequendum issue, directing the Warden of Greenhaven Correctional Facility and the United States Marshal for the Southern District of New York to produce the above named defendant in the United States District Court for the Southern District of New York, United States Court House, Foley Square, New York, N. Y., on December 30, 1974 and after the said defendant has been discharged or convicted and sentenced on said indictment, to return him to the Greenhaven Correctional Facilit

JEFFREY T. GLENN,
Assistant United States Attorney

Sworn to before me this

day of December, 1974

day of , 19

Rev. 1/30/74

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO: WARDEN OF GREENHAVEN CORRECTIONAL FACILITY
STORMVILLE, NEW YORK

and United States Marshal
Southern District of New York,

GREETING: 74 Cr. 1152

YOU ARE HEREBY COMMANDED to have the body of

ROBERT JOSEPH ENRIGHT now detained in the

GREENHAVEN CORRECTIONAL FACILITY

under your custody as it is said, under safe and secure conduct before the Judges of our District Court within and for the Southern District of New York, at the United States Court House, Foley Square, New York, New York, on December 30, 1974 at 10:30 o'clock in the forenoon, there to appear and enter a plea to indictment 74 Cr. 1152 and immediately after the said ROBERT JOSEPH ENRIGHT shall have been discharged or convicted and sentenced on said indictment, that you return him to the said GREENHAVEN CORRECTIONAL FACILITY under safe and secure conduct, and have you then and there this writ.

WITNESS the Honorable DAVID N. EDELSTEIN, Chief Judge of the United States District Court for the Southern District of New York, at the United States Court House, Foley Square, New York, N.Y., this day of December, 1974.

Clerk, United States District Court
Southern District of New York

The within writ is hereby allowed.

United States District Judge

12/27/74

day of , 19

A 17

DEC 30 1974

Writ adjourned to 1-13-75

Thomas P. Griesa
U. S. D. J.

JAN 24 1975

Writ satisfied

Marvin E. Frankel
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :

-v- : AFFIDAVIT

ROBERT JOSEPH ENRIGHT, :

Defendant. :

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)
SOUTHERN DISTRICT OF NEW YORK)

JEFFREY I. GLEKEL, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York; that he has charge of the prosecution of the above named case; that the defendant ROBERT JOSEPH ENRIGHT has been indicted by the Grand Jury for the Southern District of New York for the unlawful robbery of a bank in violation of of Title 18, United States Code, Sections 2113(a) and 2113(d).

The indictment was filed in the United States District Court for the Southern District of New York on December 10, 1974. The defendant is now confined in Attica State Prison, Attica, New York on a charge of violating conditions of parole and his confinement will terminate 1976.

That the case is now on the calendar of the United States District Court for the Southern District of New York for trial

and it is necessary that the defendant appear and stand trial.

WHEREFORE, your deponent respectfully prays that a writ of habeas corpus ad prosequendum issue, directing the Warden of Attica State Prison, Attica New York,

and the United States Marshal for the Southern District of New York to produce the above named defendant in the United States District Court for the Southern District of New York, United States Court House, Foley Square, New York, N. Y., on February 24, 1975

and after the said defendant has been discharged or convicted and sentenced on said indictment, to return him to the Attica State Prison, Attica, New York.

Jeffrey I. Glekel

JEFFREY I. GLEKEL
Assistant United States Attorney

Sworn to before me this

day of February, 1975.

A 21

TO: WARDEN of Attica State Prison,
Attica, New York

and United States Marshal
Southern District of New York,

GREETING:

YOU ARE HEREBY COMMANDED to have the body of

ROBERT JOSEPH ENRIGHT now detained in the

Attica State Prison, Attica, New York

under your custody as it is said, under safe and secure conduct before the Judges of our District Court within and for the Southern District of New York, at the United States Court House, Foley Square, New York, New York, on February 24, 1975 at 9:30 o'clock in the fore noon, there to appear and be tried on indictment 74 Cr.

and immediately after the said ROBERT JOSEPH ENRIGHT shall have been discharged or convicted and sentenced on said indictment, that you return him to the said

Attica State Prison, Attica, New York

under safe and secure conduct, and have you then and there this writ.

WITNESS the Honorable David N. Edelstein, Chief Judge of the United States District Court for the Southe District of New York, at the United States Court House, Foley Square, New York, N.Y., this day of Febru 1975.

Clerk, United States District Cour
Southern District of New York

The within writ is hereby allowed.

United States District Judge

NOTICE OF ENTRY

Sir:-Please take notice that the within is a *(certified)* true copy of a

duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:—Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

Index No. Year 19

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT J. ENRIGHT,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

MOTION TO VACATE
SENTENCE PURSUANT
TO 28 U.S.C. §2255

SUSAN N. HERMAN, Of Counsel
PIERCE GERETY, ESQ.
PRISONERS' LEGAL SERVICES OF N.Y.
Attorney for Petitioner
Office and Post Office Address, Telephone

100 Church Street
New York, New York 10007
(212) 285-0370

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

.....

Attorney(s) for

A 22

JUDGE [illegible] CIVIL COVER SHEET FEB 1 77 CIV 23 440

PLAINTIFFS

ENRIGHT, ROBERT J.

DEFENDANTS

UNITED STATES OF AMERICA

ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

[illegible] N. HORGAN
PIERCE J. GLEASON
PRISONERS' LEGAL SERVICES OF NEW YORK
100 Church Street
New York, New York 10007
(212) 285-0370

ATTORNEYS (IF KNOWN)

ROBERT B. FISKE, JR.
U.S. ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK
1 St. Andrews Plaza
New York, New York

NOTE: LIST RESIDENCE ADDRESS AND COUNTY FOR EACH PLAINTIFF AND DEFENDANT ON REVERSE SIDE.

(PLACE AN X IN ONE BOX ONLY)

BASIS OF JURISDICTION

☐ 1 U.S. PLAINTIFF ☒ 2 U.S. DEFENDANT ☐ 3 FEDERAL QUESTION (U.S. NOT A PARTY) ☐ 4 DIVERSITY

IF DIVERSITY, INDICATE RESIDENCE BELOW.

CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)

28 U.S.C. 2255. Sentence was imposed in violation of Article IV(e) of the Interstate Agreement on Detainers, 18 U.S.C. App., in that the United States failed to try petitioner before returning him to the custody of New York State.

HAS THIS OR A SIMILAR CAUSE BEEN PREVIOUSLY FILED IN SDNY AT ANYTIME? NO ☒ YES ☐ Judge Previously Assigned

(PLACE AN X IN ONE BOX ONLY) NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS	ACTIONS UNDER STATUTES: CIVIL RIGHTS	FORFEITURE/PENALTY	PROPERTY RIGHTS
110 INSURANCE	PERSONAL INJURY	441 VOTING	610 AGRICULTURE	820 COPYRIGHT
120 MARINE	310 AIRPLANE	442 JOBS	620 FOOD & DRUG	830 PATENT
130 MILLER ACT	315 AIRPLANE PRODUCT LIABILITY	443 ACCOMMODATIONS	630 LIQUOR LAWS	840 TRADEMARK
140 NEGOTIABLE INSTRUMENT	320 ASSAULT, LIBEL & SLANDER	444 WELFARE	640 R.R. & TRUCK	OTHER STATUTES
150 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT	330 FEDERAL EMPLOYERS' LIABILITY	440 OTHER CIVIL RIGHTS	650 AIR LINE REGS.	400 STATE RE-APPORTIONMENT
153 RECOVERY OF OVERPAYMENT OF VETERAN'S BENEFITS	340 MARINE	PRISONER PETITIONS	660 OCCUPATIONAL SAFETY/HEALTH	410 ANTI-TRUST
160 STOCKHOLDERS' SUITS	345 MARINE PRODUCT LIABILITY	510 VACATE SENTENCE (2255)*	690 OTHER	420 BANKRUPTCY TRUSTEE
190 OTHER CONTRACT*	350 MOTOR VEHICLE	520 PAROLE BRD. REVIEW	LABOR	430 BANKS AND BANKING
195 CONTRACT PRODUCT LIABILITY	355 MOTOR VEHICLE PRODUCT LIABILITY	530 HABEAS CORPUS	710 FAIR LABOR STANDARDS	450 COMMERCE ICC RATES, ETC.
*STATE CASES	360 OTHER PERSONAL INJURY	540 MANDAMUS & OTHER	720 LABOR MGMT. RELATIONS	460 DEPORTATION
REAL PROPERTY	365 PERSONAL INJURY PRODUCT LIABILITY	550 CIVIL RIGHTS	730 LABOR MGMT. REPORTING & DISCLOSURE ACT	810 SELECTIVE SERVICE
210 CONDEMNATION	PERSONAL PROPERTY	*NAME OF SENTENCING JUDGE	740 RAILWAY LABOR ACT	850 SECURITIES COMMODITIES EXCHANGE
220 FORECLOSURE	370 FRAUD OR TRUTH IN LENDING	COMMONWEALTH OF N.Y.	790 OTHER LABOR LITIGATION	850 STOCKHOLDER SUITS
230 RENT LEASE & EJECTMENT	380 OTHER PERSONAL PROPERTY DAMAGE	DOCKET NUMBER 74 Cr. 1152		860 SOCIAL SECURITY
240 TORTS TO LAND	385 PROPERTY DAMAGE PRODUCT LIABILITY			890 OTHER STATUTORY ACTIONS
245 TORT PRODUCT LIABILITY				970 NARA, TITLE III
290 ALL OTHER REAL PROPERTY				

(PLACE AN X IN ONE BOX ONLY) ORIGIN (PLACE AN X IN ONE BOX ONLY)

☒ 1 ORIGINAL ☐ 2 REMOVED FROM STATE COURT ☐ 3 REMANDED FROM APPELLATE COURT ☐ 4 REINSTATED OR REOPENED ☐ 5 (TRANSFERRED FROM (SPECIFY DIST.) ☐ 6 MULTIDISTRICT LITIGATION

Pleading of Indictment

RESIDENCE OF PRINCIPAL PARTIES (BY CITY)

	PTF	DEF
RESIDENT OF YOUR STATE	☐ 1	☐ 1
INCORPORATED OR PRINCIPAL BUSINESS IN STATE	☐ 2	☐ 2
INCORPORATED OR PRINCIPAL BUSINESS IN STATE	☐ 3	☐ 3
CITIZEN OR RESIDENT OF ANOTHER STATE	☐ 4	☐ 4

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMANDS $

OTHER

RELATED CASE(S) IF ANY

74 Cr. 1152

JUDGE DOCKET NUMBER

CIVIL CASES ARE DEEMED RELATED IF PENDING CASE INVOLVES:

☐ 1. PROPERTY INCLUDED IN AN EARLIER NUMBERED PENDING SUIT

☐ 2. SAME ISSUE OF FACT OR GROWS OUT OF THE SAME TRANSACTION

☐ 3. VALIDITY OR INFRINGEMENT OF THE SAME PATENT, COPYRIGHT OR TRADEMARK

JURY DEMAND: ☐ YES ☐ NO

DATE January 31, 1977

SIGNATURE OF ATTORNEY OF RECORD

ADMITTED TO PRACTICE IN THIS DISTRICT X ☐ YES ☐ NO

JS 44 / SDNY (Rev. 1/76)

UNITED STATES DISTRICT COURT (NEW YORK, SOUTHERN)

PLAINTIFF(S) ADDRESS 24

Mr. Robert J. Enright
29602
Attica Correctional Facility
Box 149
Attica, New York 14011

DEFENDANT(S) ADDRESS

DEFENDANT'S ADDRESS UNKNOWN

IT IS HEREBY MADE THAT, AT THIS TIME, I HAVE BEEN UNABLE, WITH REASONABLE DILIGENCE, TO ASCERTAIN THE ADDRESS OF THE FOLLOWING DEFENDANTS:

(3A) 25 FEB

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ROBERT J. ENRIGHT,

Petitioner,

-v-

~~74 Crim 1152~~ (CMM)

UNITED STATES OF AMERICA,

Respondent.

74 CR 1152 place in

----------X

MEMORANDUM OF LAW IN
SUPPORT OF MOTION TO
VACATE SENTENCE

SUSAN N. HERMAN
PIERCE J. GERETY
PRISONERS' LEGAL SERVICES OF
NEW YORK
Attorneys for Petitioner
100 Church Street
New York, New York 10007
(212) 285-0370

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROBERT J. ENRIGHT, :

Petitioner, :

-v- : 74 Cr. 1152 (CMM)

UNITED STATES OF AMERICA, :

Respondent. :

----------X

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE SENTENCE

SUSAN N. HERMAN
PIERCE J. CERETY
PRISONERS' LEGAL SERVICES OF NEW YORK
Attorneys for Petitioner
100 Church Street
New York, New York 10007
(212) 285-0370

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STATEMENT OF FACTS

As is set out more fully in petitioner's affidavit in support of the motion to vacate sentence, petitioner Robert J. Enright is currently in federal custody pursuant to a sentence of twenty years imposed by this Court on March 26, 1975, after conviction upon Indictment Number 74 Cr. 1152. When this indictment was filed, on December 10, 1974, petitioner was in custody of New York State, incarcerated at the Green Haven Correctional Facility [hereinafter Green Haven]. On November 15 1974, prior to the filing of the indictment, a warrant of arrest Magistrate's Docket Number 1348, issued by this Court on October 30, 1974, upon a complaint, was lodged with the office of the Head Clerk at Green Haven. This warrant was not withdraw until after petitioner was sentenced. See Exhibits B and C attached to the moving papers herein.

On December 20, 1974, upon request of the United States, this Court issued a writ of habeas corpus ad prosequendu directed to the Warden of Green Haven, requesting the Warden to surrender custody of petitioner Enright to a federal marshal, and directing the marshal to produce petitioner Enright in this Court for proceedings on Indictment Number 74 Cr. 1152, and,

"after said defendant has been discharged or convicted and sentenced on said indictment, to return him to the Green Haven Correctional Facility." See Exhibit G, attached to petitioner's moving papers. Pursuant to this writ, a deputy U.S. Marshal took custody of petitioner Enright at Green Haven and produced him for proceedings in this Court.

On January 28, 1975, petitioner Enright was returned to New York State custody without having been tried on Indictment Number 74 Cr. 1152. See Exhibit H, attached to the moving papers. The United States thereafter obtained custody of petitioner Enright again by issuance of another writ of habeas corpus ad prosequendum, directed to the Warden of the Attica Correctional Facility, and subsequently tried and sentenced petitioner upon Indictment Number 74 Cr. 1152.

ARGUMENT

POINT I

THE GOVERNMENT'S FAILURE TO TRY PETITIONER BEFORE RETURNING HIM TO STATE CUSTODY VIOLATED ARTICLE IV(e) OF THE INTERSTATE AGREEMENT ON DETAINERS AND REQUIRES DISMISSAL OF INDICTMENT NUMBER 74 Cr. 1152 WITH PREJUDICE.

A. The United States was bound to follow the procedures set forth in the Interstate Agreement on Detainers to obtain custody of petitioner for trial.

In 1970, Congress enacted into law the Interstate Agreement on Detainers, 18 U.S.C. App. [hereinafter "the Agreement"]. The purposes of the Agreement, as noted by the United States Court of Appeals for the Second Circuit in the recent decision of United States v. Mauro, 544 F. 2d 588 (2d Cir. 1975), motion for rehearing en banc pending, are set forth in Article I:

> The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article IV of the Agreement provides a mechanism by which a jurisdiction where an untried indictment, information or complaint is pending (the receiving state) may obtain temporary custody of a prisoner of another jurisdiction (the sending state) for trial. Under Article IV(a), a receiving state which has lodged a detainer against the prisoner at the institution where he is incarcerated, presents a written request for temporary custody to appropriate authorities of the sending state, provided that the request has been "approved, recorded, and transmitted" by the court having jurisdiction of the untried indictment, information or complaint. Article IV(c) then requires that the prisoner be tried within 120 days after arrival of the prisoner in the receiving state.

At issue in this case, as in Mauro, supra, is Article IV(e) of the Agreement, which provides:

> If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

The Second Circuit, in Mauro, supra at 594, held that the Agreement "in clear and unequivocal language commits the United States to all of its terms including Article IV." Thus,

once the United States "initiates the statutory mechanism," id. at 591, by seeking temporary custody of a state prisoner for trial on an untried federal indictment, the prisoner is entitled to the protections of Article IV(e). The question before the Court in Mauro was whether the terms of the Agreement apply where the United States obtains custody of a state prisoner by issuance of a writ of habeas corpus ad prosequendum, rather than by explicitly invoking the Agreement. The Court ruled that the writ of habeas corpus ad prosequendum is a detainer within the meaning of the Agreement, and that the terms of the Agreement are therefore binding on the federal government even where the Agreement is not explicitly invoked. Accord, United States ex rel. Esola v. Groomes, 520 F. 2d 830 (3d Cir. 1975); United States v. Kenaan, 422 F. Supp. 226, 228 (D. Mass. 1976) (holding that where the Agreement applies, it is the exclusive means of obtaining temporary custody of a prisoner in a jurisdiction party to the Agreement). Because the United States had obtained defendant Mauro's presence for trial, by writ of habeas corpus ad prosequendum, and returned him to state custody without first trying him, the Court found that Article IV(e) had been violated, and that dismissal of the indictment with prejudice was the proper remedy.

Under the decision in Mauro, the writ of habeas corpus ad prosequendum issued in this case on December 20, 1974, by which the government obtained temporary custody of petitioner, constitutes a detainer within the meaning of the Agreement. New York State is a party to the Agreement. N.Y. Crim. Proc. L. §580.20 (McKinney's 1971). The writ was a notification served upon the Warden of the New York State facility where petitioner was incarcerated, advising the Warden that petitioner was wanted by the United States for trial on Indictment Number 74 Cr. 1152. See Mauro, supra at 591-93. The language of the writ, ordering the federal marshal to take custody of petitioner and to return him to state custody after he was "discharged or convicted and sentenced on said indictment," is consistent with the strictures of Article IV(e), and also plainly shows that the United States was taking custody of petitioner Enright in order to try him on Indictment Number 74 Cr. 1152. Thus, under the Court's reasoning in Mauro, the issuance of the writ of habeas corpus ad prosequendum on December 20, 1974, obliged the government to comply with the provisions of Article IV. See also United States ex rel. Esola v. Groomes, supra.

In fact, the Government's obligation to follow the terms of the Agreement is even clearer in the instant case than it was in Mauro. It is not even necessary to construe the writ

of habeas corpus ad prosequendum as a detainer in this case because a preexisting federal detainer was on file with the Green Haven Correctional Facility, the institution where petitioner was serving his state sentence. The warrant of arrest, issued by this court, was lodged with the Head Clerk at Green Haven on November 15, 1974, and was not withdrawn until after peitioner was convicted and sentenced on Indictment 74 Cr. 1152. This warrant perfectly fits the definition of a detainer under the Agreement: "a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to stand trial on pending criminal charges in another jurisdiction." 116 Cong. Rec. 13999 (1970); see S. Rep. No. 1356, 91st Cong., 2d Sess., 3 U.S. Code Cong. and Admin. News 4864, 4865 (1970); Mauro, supra at 591. In fact, the FBI itself referred to the warrant lodged as a detainer. See Exhibit D, attached to the moving papers. The writ of habeas corpus ad prosequendum issued December 20, 1974, which was "approved, recorded and transmitted" by this Court is, under this view, merely a "written request" under a pending detainer, as described in Article IV(a) of the Agreement. Cf. United States v. Ricketson, 498 F. 2d 367, 373 (7th Cir.), cert. denied, 95 S. Ct. 227 (1974)

The existence of this detainer, under which a request for temporary custody was made, overcomes even the objections of the dissent in Mauro, supra at 595. While it may have been arguable before the Mauro decision that the United States was not bound to follow the procedures of the Agreement when it proceeded by writ of habeas corpus ad prosequendum, it should have been clear from the time Congress enacted the Interstate Agreement on Detainers that the United States was bound to follow the Agreement when it proceeded by detainer. Therefore, even without the decision in Mauro, the government was obliged to afford petitioner the protections of the Agreement, including Article IV(e).

B. Dismissal of the indictment with prejudice is the appropriate remedy for noncompliance with Article IV(e).

There can be no doubt that petitioner's rights under Article IV(e) were violated. The United States clearly presented a written request to appropriate authorities of the State of New York requesting temporary custody of petitioner for the purpose of trying him on Indictment Number 74 Cr. 1152.* As is shown by the exhibits attached to petitioner's moving papers,

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* The government's method of proceeding in the instant case effected not only a denial of petitioner's rights under Article IV(e), but also denied New York State the opportunity to contest the request for temporary custody of petitioner. Article IV(a) of the Agreement provides that "there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner." The writs issued herein allowed New York State no more than one week of notice.

petitioner was taken into federal custody pursuant to this request on December 27, 1974 and appeared in this Court on December 30, 1974. As is also shown by the exhibits, the writ of habeas corpus ad prosequendum issued on December 20 was marked satisfied on January 24, 1975 and petitioner was returned to state custody on January 28, 1975, without having been tried on Indictment Number 74 Cr. 1152.

The Second Circuit stated in Mauro, supra at 591 n. 3, that all that is necessary to claim a remedy under Article IV(e) of the Agreement is for the claimant to "allege that one jurisdiction has requested his transfer from another jurisdiction for trial and returned him without trying him to the first jurisdiction." See also United States v. Cappucci, 342 F. Supp. 790, 793 (E.D. Pa. 1972). There are no exceptions to Article IV(e). Mauro, supra at 592 n. 6; United States v. Ricketson, supra at 373; United States v. Sorrell, 413 F. Supp. 138, 141 (E.D. Pa. 1976).

All of the federal courts to have considered the question in reported opinions have held that dismissal of the indictment with prejudice is required if a violation of the terms of Article IV(e) is established. Mauro, supra at 595; Esola, supra at 839; Heimerle v.United States, 76 Civ. 5563 (S.D.N.Y.

1976) (Brieant, J.) (unreported); Kenaan, supra at 228; Sorrell, supra at 141.* This result would seem to be compelled by the mandatory language of Article IV(e), which specifies that the Court "shall enter an order dismissing [the indictment] with prejudice," and by Article IX of the Agreement, which provides that the Agreement is to be liberally construed so as to effectuate its purposes.

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* In United States v. Cappucci, supra, the Court held that there had been no violation of Article IV(e) because petitioner had not been transferred to the custody of another jurisdiction. Petitioner in that case was a federal prisoner transferred to another federal prison for purposes of trial in a different District.

In United States v. Ricketson, supra, the Seventh Circuit found that Article IV(e) was not violated when a state prisoner was taken into federal custody for arraignment pursuant to a writ of habeas corpus ad prosequendum and then returned to state custody before standing trial. The Court held that Article IV(e) did not apply because no detainer was pending before defendant was taken into federal custody. This holding is in direct contradiction to the Second Circuit's ruling in Mauro that a writ of habeas corpus ad prosequendum itself is a detainer within the meaning of the Agreement. Ricketson is also distinguishable from the instant case in that a detainer had been lodged against petitioner herein before the first writ of habeas corpus ad prosequendum was issued.

Neither of these two courts declared exceptions to Article IV(e), and neither expressed any doubt that dismissal of the indictment would have been required if a violation of Aritcle IV(e) were found to have occurred.

POINT II

PETITIONER NEVER WAIVED HIS RIGHTS UNDER ARTICLE IV(e).

Petitioner Enright did not make a pretrial motion to dismiss Indictment Number 74 Cr. 1152 on the ground that Article IV(e) of the Interstate Agreement on Detainers had been violated. However, petitioner contends that the Court must nevertheless dismiss the indictment on this motion. First, the language of Article IV(e) is unequivocal. When petitioner Enright was returned to state custody on January 28, 1975, the indictment was "of no further force or effect." Article IV(e) specifies that upon violation of its terms, "the court shall enter an order dismissing [the indictment] with prejudice." No defense motion is required. In Ricketson, supra at 372-73, the Seventh Circuit sua sponte asked appellant to discuss on appeal the issue of whether Article IV(e) had been violated despite the fact that, apparently, no motion to dismiss had been made in the District Court.* In Heimerle, supra, Judge Brieant granted a

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* The question of whether a violation of Article IV(e) may be raised in a criminal appeal if it was not raised in the District Court is currently pending before the Second Circuit in two cases which have already been argued: United States v. Ford, Docket No. 76-1319, and United States v. Ferro, Docket Nos. 76-1131 and 76-1160.

motion to vacate sentence purusant to 28 U.S.C. §2255, upon finding a violation of Article IV(e), although Article IV(e) had not been raised at any point during the underlying criminal proceeding.

In Mauro, supra at 591 n. 3, the Second Circuit discussed the applicable standard for judging whether a waiver of rights under Article IV(e) has taken place. The Circuit stated that to be effective as a waiver, "it must have been an 'intentional relinquishment or abandonment of a known right or privilege,'" quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938). As Judge Brieant commented in Heimerle, supra at 5,

> "That neither petitioner nor his lawyer protested when the successive writs [of habeas corpus ad prosequendum] were satisfied cannot be regarded as a waiver. Waiver is the intentional relinquishment of a known right. Prior to the decision of Judge Bartels on May 17, 1976 [United States v. Mauro, 414 F. Supp. 358, aff'd, 544 F. 2d 588 (2d Cir. 1976)], who could have known?"

As set forth in his affidavit in support of this motion, paragraph 4(e), petitioner was not advised of his rights under the Agreement before his trial. This failure was in violation of Article III(c) of the Agreement, which specifies that

> [t]he warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

The fact that petitioner was ignorant of his rights under Article IV(e) and thus did not move to dismiss the indictment pretrial is, thus, chargeable to the goverment.* At no time was petitioner informed of his rights under Article IV(e) by his attorney, the court, or the prosecution, and at no time was he asked if he was willing to waive these rights. Because petitioner was unaware of his right to be tried before being returned to state custody, he did not intentionally relinquish or abandon a known right or privilege, and therefore should not be found to have waived his claim under Article IV(e).

CONCLUSION

For the foregoing reasons, petitioner's motion to vacate sentence should be granted, and Indictment Number 74 Cr. 1152 dismissed with prejudice.

Respectfully submitted,

SUSAN N. HERMAN
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(212) 285-0370

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* This is so although the failure to advise petitioner of his rights under the Agreement was the fault of New York State officials, and not of the United States. See People v. Esposito, 37 Misc. 2d 386, 201 N.Y.S. 2d 83 (N.Y. Cty. Ct., Queens, 1960)

JIG:jw
02-1555

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

ROBERT J. ENRIGHT, :

Petitioner, :

- v - : AFFIDAVIT

UNITED STATES OF AMERICA, : 77 Civ. 449 (CMM)

Respondent. :

- x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

JEFFREY I. GLEKEL, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr,, United States Attorney for the Southern District of New York, and as such am responsible for the above-captioned matter. This affidavit is submitted in opposition to Enright's motion pursuant to 28 U.S.C. §2255 to vacate the sentence imposed upon him on Indictment 74 Cr. 1152 by the Honorable Charles M. Metzner and to dismiss the indictment.

2. On October 30, 1974, Magistrate Sol Schreiber of the United States District Court for the Southern District of New York issued a warrant authorizing Enright's arrest upon a complaint charging him with bank robbery in violation of 18 U.S.C. §2113(a).

3. Upon information and belief, on or about November 15, 1974, the arrest warrant was lodged as a detainer against Enright with the Green Haven Correctional Facility, where he was then incarcerated for a parole violation.

4. On December 10, 1974, Indictment 74 Cr. 1152 was filed in the Southern District of New York charging

Enright in two counts with armed bank robbery in violation of 18 U.S.C. Sections 2113(a)and (d).

5. On December 24, 1974, a writ of habeas corpus ad prosequendum was issued at the request of the Government directing that Enright be taken from the Green Haven Correctional Facility and produced on December 30, 1974, in the District Court for the Southern District of New York to plead to the indictment.

6. On December 30, 1974, Enright appeared in the United States District Court for the Southern District of New York, represented by his retained counsel, Gordon Lang, and entered a plea of not guilty.

7. On January 24, 1974, I received a telephone call from Enright's counsel Gordon Lang, who requested that Enright be returned to the Green Haven Correctional Facility pending the commencement of his trial. I told Mr. Lang that it was my intention to keep Enright at Federal Detention Headquarters until the termination of his trial unless Enright personally asked that he be returned to Green Haven. Mr. Lang then assured me that he was making this request at Enright's urging, and I responded that I saw no reason for not complying with Enright's request. At the conclusion of this conversation, I wrote a brief memorandum to "Files." A copy of this memorandum is attached hereto as Exhibit A.

8. As a result of my conversation with Mr. Lang, I called the Marshal's office and requested that Enright's writ be satisfied and that Enright be returned to Green Haven. The writ was satisfied on that same day and Enright was subsquently returned to Green Haven.

9. On February 20, 1975, a writ of habeas corpus ad prosequendum was issued at the request of the Government directing that Enright be taken from the Attica Correctional Facility, to which he had been transferred from Green Haven in the interim, and produced in the District Court for the

Southern District of New York on February 24, 1975 to stand trial on the indictment.

10. Enright's trial commenced on February 24, 1975 and ended on February 26 when the jury convicted him on both counts.

11. On March 26, 1975, Judge Metzner sentenced Enright to concurrent terms of twenty years on each count. He was subsequently returned to the Attica Correctional Facility.

12. Enright's counsel filed a notice of appeal on April 16, 1975.

13. On June 30, 1975, the Court of Appeals assigned the Legal Aid Society to represent Enright on appeal. On September 12, 1975, the Legal Aid Society moved, pursuant to Anders v. California, 386 U.S. 738 (1967), to be relieved as counsel because of the absence of any non-frivolous issues. On October 22, 1975, the Court of Appeals granted this motion and affirmed Enright's conviction.

14. Enright did not raise his present claim before either the District Court or the Court of Appeals.

15. As is set forth in the Government's memorandum of law, Enright's claim is not cognizable under 18 U.S.C. §2255 and has, in addition, been waived.

WHEREFORE, it is respectfully submitted that upon this affidavit and the Government's memorandum of law, Enright's motion should be denied without a hearing.

JEFFREY I. GLEREL
Assistant United States Attorney

Sworn to before me this

day of , 1977.

A 46

TO: FILES

Jan. 24, 1975

FROM: JEFFREY GLEKEL

On this date I spoke to Robert Enright attorney, Gordon LANG, ~~a~~ who requested that I return his client to Cleveland pending trial. He told me that he was conveying Enright's request to be returned to Cleveland.

Jeffrey Glekel

IG:jw
2-1555

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

ROBERT J. ENRIGHT, :

Petitioner, :

- v - : 77 Civ. 449 (CMM)

UNITED STATES OF AMERICA, :

Respondent. :

- x

GOVERNMENT'S MEMORANDUM OF LAW
IN OPPOSITION TO ENRIGHT'S MOTION
PURSUANT TO 28 U.S.C. § 2255

Robert J. Enright has moved pursuant to 28 U.S.C. §2255 for an order to vacate the sentence imposed upon him on Indictment 74 Cr. 1152 and to dismiss the indictment. He bases his claim upon the Interstate Agreement on Detainers Act, 18 U.S.C. Appendix (Pub. L. 91-538, Sections 1-8, Dec. 9, 1970) ("the Act"). The Government opposes this motion because (1) Enright has failed to raise a claim cognizable under Section 2255 and (2) he waived any right to raise this claim when he (a) requested to be returned to state custody pending trial and (b) failed to raise the claim prior to trial, at trial, or on appeal.

1. THE FACTS

On October 30, 1974, a complaint was filed in the Southern District of New York charging Enright with bank robbery. The arrest warrant issued pursuant to this complaint was lodged on or about November 15, 1974, as a detainer against Enright with the Green Haven Correctional Facility, where he was then incarcerated for a parole violation. On December 10, 1974, Indictment 74 Cr. 1152 was filed in the Southern District of New York charging Enright in two counts with armed bank robbery in violation of 18 U.S.C. §§ 2113(a) and (d). On December 24, 1974, a writ of habeas corpus ad prosequendum was issued to produce Enright in the Southern District of New York for arraingment on the indictment. Enright was produced pursuant to this writ and on December 30, 1974, appeared in United States District Court represented by his retained counsel, Gordon Lang, and entered a plea of not guilty to the indictment. Subsequently, on January 24, 1974, as is set forth in paragraph 7 of the affidavit of Assistant United States Jeffrey I. Glekel, Enright requested, through Mr. Lang, that he be returned to state custody pending his trial. The Government complied with this request and arranged for his return to Green Haven. It is this transfer which Enright claims violated the Act and should result in his release from custody.

On February [illegible] 1975, a second writ was issued to produce Enright in the Southern District of New York to stand trial. Enright was returned to the Southern District pursuant to this writ and stood trial. On February 26, 1975, after a three day trial before the Honorable Charles M. Metzner, a jury found Enright guilty on both counts. Judge Metzner sentenced Enright to cuncurrent twenty year terms of imprisonment on March 26, 1974. Following his sentencing Enright was returned to state custody. His conviction was affirmed by the Court of Appeals on October 22, 1975.

Enright failed to raise his present claim at either his trial or on appeal.

2. ENRIGHT'S MOTION FAILS TO STATE A CLAIM COGNIZABLE UNDER 28 U.S.C. § 2255

The Supreme Court has repeatedly held that a non-constitutional claim is cognizable under §2255 only upon a showing of "a fundamental defect which inherently results in a complete miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962). See also Davis v. United States, 417 U.S. 333, 346 (1974); Sunal v. Large, 332 U.S. 174, 178-79 (1947). "Collateral relief is not available when all that is shown is a failure to comply with the formal requirements" of a rule of procedure. Hill, supra, at 429.

It is clear that the Government's action in returning Enright to state custody pending trial did not result in a "complete miscarriage of justice" nor constitute "an omission inconsistent with the rudimentary demands of fair procedure." Even apart from the fact that Enright's return to state custody was a result of his own request, it did not in any way prejudice his interest as a defendant under federal indictment. It is significant to note that his trial was held well within the 120 day period provided in Article IV(C) of the Act. Moreover, his return minimized any interruption or loss of time on his state sentence.*

In view of these considerations, it is apparent that Enright does not even approach the showing of injustice required to confer § 2255 jurisdiction. He was convicted by a jury of armed bank robbery. The conviction was affirmed on appeal after his counsel was unable to find single non-frivolous issue. Enright, even now, is unable to point to any significant flaw in his trial. At best, he makes a belated claim of a procedural error totally unrelated to guilt or

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* These results coincide exactly with the purposes of the Act as set forth in its own Article I; that is, to encourage a prompt trial within 120 days of the prisoner's arrival in the receiving jurisdiction and to reduce uncertainties and disruption in the prisoner's rehabilitation and other programs of the sending jurisdiction.

innocence. Indeed, in Hill v. United States and Sunal v. Large, supra, the Supreme Court held that the remedy of habeas corpus was unavailable in circumstances far more compelling than those presented here. In Hill, the judge failed to comply with Fed. R. Crim. P. 32(a), which requires the judge to afford the defendant an opportunity to make a statement in mitigation of punishment prior to the imposition of punishment. In Sunal v. Large, the Supreme Court held that §2255 was unavailable to petitioners who had been denied an opportunity to present a defense which subsequent Supreme Court decisions held should clearly have been available to them. Enright's highly technical claim is much further removed from the fairness of his conviction and sentence than those rejected in Hill and Sunal and falls far short of what is required to invoke § 2255.*

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* The only opinion known to the Government granting post-conviction relief under §2255 is that of Judge Brieant in Heimerle v. United States, 76 Civ. 5563 (S.D.N.Y., Dec. 15, 1976). Judge Brieant, However, never considered the question of §2255 jurisdiction, perhaps because the Government, as a result of not having been served, never filed responsive papers in the proceeding. Judge Brieant has permitted the Government to file reargument papers and presently has the matter sub judice.

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3. ENRIGHT WAIVED ANY RIGHTS HE MAY HAVE HAD UNDER THE ACT

Enright claims that the indictment should be dismissed because the Government violated Article IV(e) of the Act which provides that the prisoner be tried by the receiving state prior to being returned to his original place of imprisonment. The Court of Appeals recently held, however, in United States v. Ford, Dkt. No. 1319 (2d Cir., February 3, 1977) that this "provision . . . which is intended to avoid the disruptions in a prisoner's rehabilitation occasioned by repeated transfers between jurisdictions, is thus for his benefit and is waivable." Slip. op. at 1698. The Court concluded that by requesting a transfer, a prisoner thereby waives any objection to it under the Act. Id. Here, as is set forth in the affidavit of Assistant Untied States Attorney Jeffrey I. Glekel, Enright specifically requested his transfer through his attorney and was transferred solely as a result of this request.* Consequently, Enright waived whatever rights he may have had in connection with this transfer.

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* Thus this case, like Ford, is clearly distinguishable from the earlier decision in United States v. Mauro, Dkt. No 76-1251 (2d Cir., October 26, 1976), slip. op. at 270 n.3, where the Court refused to find a waiver where it was clear to a federal defendant that he would be returned to state custody regardless of his wishes. Here, in contrast, Enright's transfer resulted exclusively from his request. Moreover, Enright did not sacrifice any right by requesting a transfer, because the only right afforded by the Act is not to be returned to the sending jurisdiction prior to trial without one's consent - something which the Government had no intention of doing.

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In addition, Enright waived any right to raise his present claim when he failed to assert it before his trial, during his trial, or on appeal. First, under Fed. R. Crim. P. 12(b) and 12(f) Enright's claim should have been made before trial in the form of a motion to dismiss his indictment. This is so because his claim is one based upon a defect in the institution of the prosecution. His failure to make this claim prior to trial clearly precludes § 2255 relief. Francis v. Henderson, 425 U.S. 536 (1976); Davis v. United States, 411 U.S. 233 (1973). In United States v. Brown, 76 Cr. 244 (S.D.N.Y., July 15, 1976), Judge Metzner found that a defendant's motion to dismiss an indictment for failure to comply with the Act was untimely even though made prior to trial.* Secondly, is is well established that where, as here, a defendant fails to raise a non-constitutional issue at both trial and appeal, he is barred from doing so for the first time by way of §2255. See Sunal v. Large, 332 U.S. 174, 178 (1947); Davis v. United States, 417 U.S. 333, 345 n.15 (1974); United States v. Loschiavo, 531 F.2d 659, 662-63 (2d Cir. 1976); United States v. Travers, 514 F.2d 1171, 1176-77 (2d Cir. 1974).

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* In United States v. Cyphers, Dkt. No. 1131 (2d Cir., February 8, 1977), the Court of Appeals held that Fed. R. Crim. P. 12 did not bar the assertion of a claim under the Act for the first time on appeal where the defendant was unaware that a federal detainer had been lodged against him. Slip. op. at 1745. Here, in contrast, Enright admits implicitly in paragraph 4 (e) of his moving affidavit, that he was aware of the lodging of the federal arrest warrant from approximately December 2, 1974.

CONCLUSION

Enright's claim should be denied without a hearing because its not cognizable under §2255 and has been waived by Enright's failure to raise it pre-trial, during trial, or on appeal.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

JEFFREY I. GLEKEL
Assistant United States Attorney

- Of Counsel -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ROBERT J. ENRIGHT, :

Petitioner, :

-v- : 77 Civ. 449 (CMM)

UNITED STATES OF AMERICA, : AFFIDAVIT

Respondent. :

----------X

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GORDON LANG, being duly sworn, deposes and says:

1. I am an attorney admitted to the practice of law in the State of New York, and make this affidavit at the request of petitioner herein.

2. I was retained in January, 1975 to represent Robert J. Enright, petitioner herein, upon the trial of Indictment Number 74 Cr. 1152, and represented him at trial, and through his sentencing on March 25, 1975.

3. I have read the affidavit in opposition submitted herein by the Government and I have no independent recollection of the telephone conversation between myself and Assistant United States Attorney Jeffrey I. Glekel on January 24, 1975, described in the [illegible] affidavit in opposition at paragraph 2.

4. I have reviewed my file on Indictment Number 74 Cr. 1152, and have no notes or memoranda pertaining to this conversation, or to any request by my client, petitioner herein, to be transferred to New York State custody.

5. I do not recall petitioner herein ever having asked me to effect his transfer to state custody before the trial on Indictment Number 74 Cr. 1152, or any discussion between petitioner herein and myself on the subject of his transfer to state custody.

6. I know of no reason why petitioner herein would have desired to be transferred to state custody before trial on Indictment Number 74 Cr. 1152.

GORDON LANG
299 Broadway
New York, New York

Sworn to before me this
9 day of March, 1977.

NOTARY PUBLIC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

ROBERT J. ENRIGHT, :

Petitioner, :

-v- :

UNITED STATES OF AMERICA, :

Respondent. :

----------X

77 CIV 449
(CMM)
AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF WYOMING) SS.:

ROBERT J. ENRIGHT, being duly sworn, deposes and says:

1. I am the Petitioner in the above-styled proceeding and make this affidavit in response to the affidavit filed in this proceeding by Assistant United States Attorney JEFFREY I. GLEKEL.

2. At no time did I ever request GORDON LANG, my attorney for the proceedings in 74 CR 1152, or anyone else, to effect my transfer from Federal Detention Headquarters to the Green Haven Correctional Facility prior to my trial on Indictment No. 74 CR 1152.

3. I was not advised by GORDON LANG, or by anyone else, that Mr. Lange intended to request my transfer to New York State custody during January 1975.

4. I was not informed by Mr. Lang or by anyone else that Mr. Lang intended to speak or had spoken with Assistant United States Attorney Glekel about transferring me to State custody.

5. As is shown by my request for a speedy trial dated December 15, 1974 [exhibit attached to the moving papers herein], I desired and actively sought a prompt resolution by trial of the charges against me in 74 CR 1152.

6. It was my wish to remain at Federal Detention Headquarters until my trial on Indictment No. 74 CR 1152. When I was informed, in January 1975, that my transfer to Green Haven Correctional Facility had been ordered, I protested this decision and continued to assert my desire to remain at Federal Detention Headquarters.

7. I did not appear in open court on January 24, 1975 when a Writ of Habeas Corpus ad prosequendum was marked satisfied by Hon. MARVIN FRANKEL.

WHEREFORE, it is respectfully submitted that upon this affidavit and Petitioner's moving papers herein, Petitioner's Motion to Vacate Sentence should be granted, or a hearing held pursuant to 28 U.S.C. Section 2255.

ROBERT J. ENRIGHT

Sworn to before me this

____ day of March, 1977

_____
Notary Public
ARTHUR J. GIACALONE
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1978.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT J. ENRIGHT,

Petitioner,

-v-

UNITED STATES [illegible] ICA,

Respondent.

77 Civ. 449 (CHM)

AFFIDAVIT IN REPLY

STATE OF NEW YORK)
COUNTY OF NEW YORK : SS.:
SOUTHERN DISTRICT OF NEW YORK)

SUSAN N. HERMAN, being duly sworn, deposes and says:

1. I am attorney for petitioner herein and make this affidavit in reply to respondent's affidavit and memorandum of law in opposition to petitioner's motion pursuant to 28 U.S.C. §2255.

2. As is set forth in petitioner's memorandum of law, submitted herewith, and the attached supplemental affidavit of petitioner and affidavit of Gordon Lang, Esq., petitioner alleges that he did not request his transfer to state custody in January, 1975, before his trial on 74 Cr. 1152, and therefore has not waived the claim under Article IV(c) of the Interstate Agreement on Detainers asserted in his moving papers.

3. Petitioner is presently incarcerated at the Attica Correctional Facility, Attica, New York. If a hearing is held on the factual issues presented herein, as discussed in petitioner's memorandum of law in reply at pp. 15-17, I believe that petitioner's

WHEREFORE, it is respectfully requested that the Court grant petitioner's motion as set forth in the moving papers herein or, in the alternative, if a hearing is set, that the Court require petitioner's presence at the hearing by allowing the attached writ of habeas corpus ad testificandum.

SUSAN N. HERMAN

Sworn to before me this

day of March, 1977.

NOTARY PUBLIC

WRIT OF HABEAS CORPUS AD TESTIFICANDUM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE PRESIDENT OF THE UNITED STATES OF AMERICA

TO: WARDEN OF ATTICA CORRECTIONAL FACILITY,
ATTICA, NEW YORK

and United States Marshal,
Southern District of New York
Western District of New York,

GREETING:

WE ARE HEREBY COMMANDED to have the body of ROBERT JOSEPH ENRIGHT, now detained in the Attica Correctional Facility under your custody, as it is said, under safe and secure conduct before the Judges of our District Court within and for the Southern District of New York, at the United States Court House, Foley Square, New York, New York, on , 1977 at o'clock in the noon, there to testify the truth according to his knowledge in a certain cause now pending in said court, and then and there to be heard, entitled ROBERT J. ENRIGHT v. UNITED STATES, No. 77 Civ. 449, before the said court, and immediately after the said purpose aforesaid shall be [illegible]

[illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT J. ENRIGHT,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

77 Civ. 449 (CHM)

PETITIONER'S MEMORANDUM OF LAW IN REPLY

SUSAN N. HERMAN
PIERCE J. GERETY
PRISONERS' LEGAL SERVICES OF NEW YORK
Attorneys for Petitioner
[illegible]

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INTRODUCTION

In its memorandum of law herein, the government in effect concedes the validity of petitioner's claim that his transfer to state custody before trial on 74 Cr. 1152 was in violation of the provisions of Article IV(e) of the Interstate Agreement on Detainers. The government has not attempted to dispute that it was bound by the provisions of Article IV(e) in this case; that the government brought petitioner into federal custody for proceedings on 74 Cr. 1152 by a writ of habeas corpus ad prosequendum, which constitutes a request under a pending detainer, within the meaning of the Interstate Agreement; that petitioner was returned to state custody without having been tried on 74 Cr. 1152; or that dismissal of the indictment with prejudice is the appropriate and only remedy for noncompliance with Article IV(e).

Rather, the government asks this court to decline to consider petitioner's claim, either on the ground that it "fails to state a claim cognizable under 28 U.S.C. §2255," Government's Memorandum of Law at 3, or on the ground that petitioner has waived his claim in one of three different ways. Government's Memorandum of

basis has been presented for finding any waiver. Therefore, it is respectfully submitted that petitioner's motion should be granted upon petitioner's moving papers, memoranda of law, and reply papers.

I. PETITIONER'S CLAIM IS COGNIZABLE UNDER 28 U.S.C. §2255.

A. Claims of Nonconstitutional Error May Be Raised on a §2255 Motion.

Section 2255 provides that a prisoner in custody under sentence of a federal court may move the sentencing court to vacate or set aside his sentence

> upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack . . .

Petitioner has alleged that he was sentenced in violation of a law of the United States, i.e., Article IV(e) of the Interstate Agreement on Detainers, 18 U.S.C. App. (1970), and/or that, under the terms of Article IV(e), the court was without jurisdiction to impose sentence upon him in 74 Cr. 1152.

The government asserts that petitioner's claim should not be considered on this motion because the claim is not based on the Constitution, and does not meet stringent tests the government derives from dicta in several Supreme Court cases. The government has taken this position in the past, unsuccess[illegible]. In Davis v. United States, 417 U.S. 333 (1974), the [illegible] Court [illegible] that non- [illegible] motion. [illegible]

[illegible] is 'in violation of the Constitution or laws of the United States.' (Emphasis added.)"

Id. at 342-43. So stating, the Court agreed to consider Davis' claim that he had been sentenced in violation of the laws of the United States (in that he had been found guilty of refusing to obey an arguably invalid induction order). See also United States v. Travers, 514 F.2d 1171, 1173 (2d Cir. 1974).

While ruling that nonconstitutional claims are cognizable on §2255 motions, the Court did note that in two earlier cases, Sunal v. Large, 332 U.S. 174 (1947) and Hill v. United States, 368 U.S. 424 (1962) particular claims of nonconstitutional error had been found to be inappropriate for consideration on a §2255 motion. Neither Davis, Sunal or Hill, however, established the blanket limitations on §2255 jurisdiction suggested by the government in its memorandum of law herein.

As the Davis Court stated:

> Sunal cannot be read to stand for the broad proposition that nonconstitutional claims can never be asserted in collateral attacks upon criminal convictions. Rather, the implication would seem to be that, absent the particular considerations regarded as dispositive in that case [i.e., the unjustified failure to raise the asserted claim on appeal, see id.], the fact that a contention is grounded not in the Constitution, but in the 'laws of the United States' would not preclude its assertion in a §2255 proceeding. [footnote omitted]

see Davis, supra at 345.*

The Court has also noted that Hill and Sunal do not embody jurisdictional prerequisites, or define the power of the court to entertain a particular contention on a §2255 motion. They are merely standards guilding the exercise of the court's discretionary powers. See Kaufman v. United States, 394 U.S. 217, 220 n.3 (1969); Sunal, supra at 179-80; Loschiavo, supra at 666. Thus, regardless of the court's conclusions as to whether a nonconstitutional claim asserted is comparable to the claims in Hill or Sunal, the court has power to consider the claim.

B. Petitioner's Claim That the Court was Without Jurisdiction to Impose Sentence on Indictment Number 74 Cr. 1152 Must be Heard on This Motion.

Davis, Hill and Sunal all dealt with claims on §2255 motions, that sentence had been imposed in violation of a law of the United States. The courts have recognized that the principles adopted in those cases to guide the exercise of a court's discretion do not apply where the claim raised is "based on constitutional errors or on a lack of jurisdiction, in the broad sense of the court's power to adjudicate the issues." Loschiavo, supra at 662-63 [Emphasis added]; see

* These [illegible] guiding the court's discretion in deciding when to hear a claim that sentence was imposed in violation of a law of the United States, will be explored infra in point C and D.

very nature fundamental, and therefore cannot be characterized as a minor error like that in Hill. A jurisdictional claim may be raised regardless of whether the claim was raised on direct appeal, a clear distinction from Sunal. Compare Kaufman, supra, where the court ruled that a constitutional claim was properly asserted on a §2255 motion even though it had not been raised on appeal. As this Court stated in an opinion in Loschiavo, supra, if the court did not have jurisdiction over the crime charged, vacatur of the conviction is mandatory. See id. at 661.*

In the instant case, the court was without jurisdiction to impose sentence on petitioner in 74 Cr. 1152. The clear and unequivocal language of Article IV(e) provides that upon violation of that Article, the indictment "shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." As the Second Circuit indicated in United States v. Cyphers & Ferro, Dkt. No. 76-1131, Slip op. at 1737, 1744 (2d Cir., February 8, 1977), this section, by its language, is self-executing -- no defense motion is required to claim a remedy under Article IV(e). See also Article

January 28, 1975, then the court was without jurisdiction to impose sentence upon conviction under this invalid indictment. Compare Davis, supra; Loschiavo, supra; Hayes, supra.

The jurisdictional nature of the claim petitioner asserts herein is demonstrated by the Second Circuit's decision in Cyphers, supra. In that case, appellant Ferro raised, on his direct criminal appeal, the same claim petitioner asserts herein: that he had been transferred from state to federal custody twice before his federal trial, in violation of the terms of Article IV(e), see id. at 1744, and the government argued that he therefore should not be permitted to raise this claim on appeal. The Second Circuit found that appellant Ferro had not waived his claim by failing to raise this ground in the District Court, explaining that Article IV(e) does not impose any requirement that a defendant request relief under its terms. Id. at 1744.

On finding that appellant Ferro had stated a violation of Article IV(e), the Court of Appeals simply ordered the indictment dismissed with prejudice. Id. at 1744, 1749. The Court did not remand the claim for the District Court's consideration, or even to allow the District Court the opportunity to order the indictment dismissed. This action demonstrates the violation of Article IV(e) is not a [illegible], such that the [illegible] jurisdiction [illegible] upon the [illegible] and [illegible] Article IV(e) whenever such violation is brought to the court's attention. See also United States v. Ford, Dkt. No. 76-1349, Slip op. 1681 at 1700-01 (2d Cir., February 3, 1977).

C. Petitioner's Claim That Sentence was Imposed in Violation of a Law of the United States is Cognizable on This Motion.

As described in Point IA, supra, under Davis, a nonjurisdictional claim that sentence was imposed in violation of a law of the United States is fully cognizable on a §2255 motion unless it falls within the rationales of Hill v. United States, supra, or Sunal v. Large, supra. Petitioner's claim is not susceptible to dismissal on the grounds discussed in Hill.

Hill appears to be the only case in which the Supreme Court ever rejected a claim on the ground that it was not of the "character or magnitude" appropriate for consideration on collateral attack. Id. at 428. Petitioner Hill alleged a technical denial of his right to allocution under F.R.Crim.P. 32(a). The Court, concerned with deterring a flow of motions to vacate sentence or motions for new trials based upon trial errors at trial or at sentence, see Sunal, supra at 182, decided that the error Hill asserted was too minor to warrant relief on collateral attack. The Court went on to indicate that its decision might have been different if the asserted error had been constitutional or jurisdictional, or if the error had engendered a fundamental defect resulting in a miscarriage of justice, or if exceptional circumstances had been present. Id at 428. The Court did not state that any of these showings, or any one particular showing, was necessary to entitle a claim to consideration on a §2255 motion - only that Hill's allegations were not sufficient under these general guidelines. See Davis, supra at 346. In fact, the District Court had declined to entertain Hill's claim, and

the Court of Appeals had affirmed this decision; the Supreme Court's ruling only confirmed the District Court's exercise of its discretionary powers. Compare Loschiavo, supra at 666, where the Court of Appeals affirmed this court's decision to consider a nonconstitutional claim asserted on a §2255 motion.*

Petitioner's claim herein clearly is not a trivial error of the type deplored in Hill. The importance of the provisions of Article IV(e), prohibiting transfers of prisoners awaiting trial, has already been determined by Congress, which adopted the Interstate Agreement, and provided the extreme sanction of dismissal of the indictment with prejudice as the appropriate and only remedy for violation of its terms. See United States v. Ford, Dkt. No. 76-1319, Slip op. at 1700-01 (2d Cir., February 3, 1977). In United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), petition for rehearing en banc pending, and in Cyphers, supra, the Second Circuit accepted Congress' judgment by giving full effect to the clear and unequivocal provisions of Article IV(e). See also Ford, supra at 1695, 1701.

Furthermore, petitioner's claim that his sentence was imposed in violation of a federal law must be cognizable on a §2255 motion because the same claim would be cognizable in a

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* Because the Supreme Court did not discuss the question of whether a rule of criminal procedure is a "law" of the United States within the meaning of §2255, it is not entirely clear that the violation of Rule 32(a) allegedly [illegible] amounts to [illegible] that Hill's sentence was imposed in violation of the "laws" of the United States. Hill may be interpreted, however, as defining the vague phrase in §2255 permitting motions to vacate sentences "otherwise subject to collateral attack," 28 U.S.C. §2255, cf. United States v. Fischer, 381 F.2d 509, 512 (2d Cir. 1967), cert. denied, 390 U.S. 973 (1968), and therefore as being inapplicable where a claim concerning a specific law of the United States is involved.

petition for a writ of habeas corpus brought by a state prisoner under 28 U.S.C. §2254. See United States ex rel. Esola v. Groomes, 520 F.2d 830 (3d Cir. 1975). The Supreme Court has often reiterated the familiar proposition that "section 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus," Davis, supra at 343-44; United States v. Hayman, 342 U.S. 205, 219 (1952). Because the creation of §2255 was not intended to impinge on federal prisoners' right of collateral attack, see id., the Supreme Court has also stated that "there can be no doubt that the grounds for relief under §2255 are equivalent to those encompassed by §2254, the general federal habeas corpus statute." Davis, supra at 344; see Kaufman, supra at 222, 225-26, 228; Sanders v. United States, 373 U.S. 1, 15-19 (1963).

In Esola, supra, a state prisoner brought a petition for a writ of habeas corpus under 28 U.S.C. §2254, alleging the same claim that petitioner herein alleges: that Article IV(e) of the Interstate Agreement on Detainers had been violated in the course of his prosecution. Since both the sending state (the United States) and the receiving state (New Jersey) had adopted the Agreement, the Court found that Esola stated a claim that he was in custody in violation of a law of the United States, i.e., Article IV(e) of the Interstate Agreement, and therefore had stated a claim which, if proven, would entitle him to relief from his state conviction under §2254. See also Heimerle v. United States, 76 Civ. 5563 (S.D.N.Y. 1976) (granting an identical claim on a §2255 motion).

Thus, as in Davis, petitioner's claim that he was sentenced in violation of the Interstate Agreement on Detainers is an appropriate ground for relief on a collateral attack under §2255.

D. Petitioner Did Not Deliberately Bypass His Procedural Remedies.

1. Direct Appeal

In Sunal v. Large, supra, the Court ruled that an unjustifiable failure to raise a claim on direct appeal may, absent unusual circumstances, preclude that claim from being considered on a §2255 motion. See Davis, supra at 345. Again, as described supra, p. 5, the question is not one of the court's power to hear the claim but of the proper exercise of judicial discretion. The test applied to determine whether failure to have raised a claim on appeal was unjustifiable is the deliberate bypass standard set forth in Fay v. Noia, 372 U.S. 391, 438-39 (19[illegible]). See Kaufman, supra at 220 n.3, 227 n.8; Sanders, supra at 18-19; Loschiavo, supra at 666. See also Williams v. United States, 463 F.2d 1183, 1184-85 (2d Cir.), cert. denied, 409 U.S. 967 (1972).

As the Court commented in Kaufman, supra at 228, there is "no reason . . . to give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous [illegible]." Thus, petitioner's [illegible] Article IV(e) [illegible] Article IV(e) and intentionally relinquished or surrendered these rights. Fay, supra at 439, quoting Johnson v. Zerbst, 304 U.S.

458, 464 (1938); see United States v. Mauro, supra at 591 n.3. The Supreme Court has defined the deliberate bypass rule in some detail:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of [raising his claim in the state courts, or by analogy, on direct appeal], whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state [or appellate] procedures, then it is open to the federal court on habeas to deny him all relief . . . --though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default . . . At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief.
>
> (Fay, supra at 439 [citations omitted])

Petitioner has asserted that he was not aware of his rights under Article IV(c) of the Interstate Agreement on Detainers [Affidavit, ¶4c], despite the fact that under Article III(c) of the Agreement, New York State was obliged to advise him of these rights. Under the standard applied in Fay, supra, and in Mauro, supra, he could not have waived these rights absent a knowing and intelligent decision not to raise this claim before trial or on appeal. In Mauro, supra, the court found that petitioner [illegible] which he was [illegible] at [illegible] [illegible] raised his appellate remedies.

2. Pretrial Motion

The same standards apply to judge whether petitioner deliberately bypassed his right to make a pretrial motion on this ground. See, e.g., United States v. West, 494 F. 2d 1314 (2d Cir.), cert. denied, 419 U.S. 899 (1974). In Mauro, supra at 591 n.3, the Second Circuit specifically stated that an effective waiver of rights under Article IV(e) must be shown to be an "intentional relinquishment or abandonment of a known right or privilege," quoting Johnson v. Zerbst, supra. In United States v. Cyphers & Ferro, supra at 1744-45, the Second Circuit applied this ruling by holding that appellant Ferro [illegible] entitled to dismissal with prejudice of the indictment underlying his conviction when he alleged, on appeal, a violation of the terms of Article IV(e). The Court considered this claim on appeal despite the fact that the claim had not been raised in the District Court.

The government argued in Cyphers, as it does herein, that the failure to raise this claim by pretrial motion constituted a waiver under F.R. Crim. P. 12(f). The Court rejected this contention, stating that "[w]hile the policies underlying Rule 12(f) are helpful guides, they are not determinate in construing statutes." Id. at 1745. Compare United States v. Wingo, 407 F.S. 514, [illegible] claim under Article IV(e) [illegible] governed by F.R. Crim. P.

12(f), and therefore is not automatically waived simply because it was not raised pretrial. The same reasoning certainly applies to F.R.Crim.P. 12(b), which does not, by its terms, encompass this statutory claim. The Court went on to note that Article IV(e) violations need not be raised on a pretrial defense motion. Cyphers, supra at 1744. A literal reading of the language of Article IV(e), which provides that "if trial is not had on any indictment . . . prior to the prisoner's being returned to the original place of imprisonment . . . such indictment . . . shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice," [Emphasis added], virtually compels the conclusion that no defense motion is necessary to invoke the remedy provided. The ruling was further supported by reference to Article IX of the Agreement, which requires that the provisions of the Agreement be liberally construed. See Cyphers, supra at 1745. The Court ordered the indictment against Ferro dismissed, after finding that Ferro had not knowingly and intelligently waived his rights under the Agreement, since he had not even been aware that a detainer had been lodged against him.* Id. Thus, the question now before this court is the same factual question considered by the Court of Appeals in Cyphers, supra: whether [illegible]

* [illegible]

remedies by knowingly and intelligently deciding to relinquish or abandon his rights under Article IV(e).

II. IF A HEARING IS HELD, PETITIONER'S PRESENCE IS ESSENTIAL.

Section 2255 provides:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

As demonstrated in Point I, supra, petitioner has raised a cognizable claim under §2255, that his sentence was imposed in violation of the laws of the United States, or that the court was without jurisdiction to impose such sentence.

In addition to contending that petitioner has waived his rights by his failure to move for the relief requested herein at an earlier proceeding, the government also alleges that petitioner waived his rights under Article IV(e) by requesting his transfer to state custody in January, 1975, through his attorney. Affidavit in Opposition ¶7; see United States v. Ford, supra. The government's affidavit is not part of the motion, files and records of the case for the purpose of showing that petitioner is entitled to no relief. Dalli v. United States, 491 F.2d 758, 762 n.4 (2d Cir. 1974); Taylor v. United States, 487 F.2d 307, 308 (2d Cir. 1973). [illegible] Government Affid ¶2.

The government's only contradictory allegation is pure hearsay, which would not be admissible upon a hearing. Therefore, a factual hearing is not a necessary prerequisite to granting petitioner's motion.

If, however, the court wishes to hold a hearing, petitioner's presence is essential. In United States v. Hayman, 342 U.S. 205 (1952), petitioner Hayman brought a §2255 motion on the ground that his attorney at trial had had a conflict of interest, in that he had represented both petitioner and one of the principal witnesses against petitioner at trial. The government alleged in an affidavit that petitioner had waived his claim by consenting to this dual representation, and the petition thereupon was dismissed without a hearing. The Supreme Court held that it was error to make "findings on controverted issues of fact relating to respondent's [Hayman's] own knowledge without notice to respondent [Hayman], and without his being present." Id. at 220.

The question before the court herein is whether petitioner knowingly and intelligently waived his rights under Article IV(e) by requesting a transfer. The standards of Fay v. Noia, supra, discussed supra at p.12, are applicable here too, so it must be shown that any request was made due to petitioner's decision, not just that of his counsel. Fay supra at 438. In Ford, supra, the Court had that assurance, since Ford had personally requested his return to state custody, and made this request in open court where inquiry about the voluntariness of his decision was possible. See United States v. Ford, Dkt. No. 76-1319, Appellant's Reply Brief

at 6. By contrast, petitioner Enright's attorney is alleged to have requested petitioner's transfer. Affidavit in Opposition ¶7. Petitioner states that any such request was unauthorized. Supplemental Affidavit ¶¶2-6. The attorney in question, Gordon Lang, states that he does not recall petitioner having made such a request, or any reason why petitioner would have made such a request. Affidavit of Gordon Lang ¶¶5-6. Further, petitioner was not produced in court on January 24, 1975, when the writ of habeas corpus ad prosequendum which had brought him into federal custody was marked satisfied, petitioner's Supplemental Affidavit ¶7, so the court never had an opportunity to determine whether the request for a transfer in fact emanated from petitioner himself.

Because petitioner, like Hayman, was a central participant in these events, his presence should be required at any factual hearing held, so that he may give his testimony.*

CONCLUSION

For the reasons stated, petitioner's motion should be granted, or a hearing held to determine the factual questions presented.

Respectfully submitted,

SUSAN N. HERMAN
PIERCE J. GERETY
PRISONERS' LEGAL SERVICES OF NEW YORK
Attorneys for Petitioner
100 Church Street - 18th Floor
New York, New York 10007
(212) 285-0370

* A writ of habeas corpus ad testificandum to obtain petitioner's presence for a hearing is submitted herewith.

JIG:ka

March 18, 1977

The Honorable Charles H. Metzner
United States District Judge
Room 2201
United States Courthouse
Foley Square
New York, New York 10007

Re: Enright v. United States
77 Civ. 449

Dear Judge Metzner:

The Government recently filed in the Court of Appeals a petition for rehearing and rehearing en banc in the case of United States v. Ford, Dkt. No. 76-1319, slip op. 1681 (2d Cir., February 3, 1977). The petition is currently pending. In Point II of this petition, a copy of which I enclose, the Government took the position that the Court of Appeals decision in United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), which held for the first time that the United States is a "receiving State" within the meaning of the Interstate Agreement on Detainers ("Agreement") and that a writ of "habeas corpus ad prosequendum was the equivalent of a "request" by the prosecuting authority under the Agreement, should not be applied retroactively.

The Government respectfully directs the Court's attention to the Ford petition and urges the position set forth therein that Mauro should not be applied to transfers like Enright's that antedated it. In addition, of course,

JIG:ka

The Honorable Charles M. Metzner March 18, 1977

the Government contends, as set forth in its memorandum of law, that Enright's claim is not cognizable under § 2255 and has, in any event, been waived through procedural defaults.

Respectfully yours,

ROBERT B. FISKE, JR.
United States Attorney

By: _____
JEFFREY I. GLEKEL
Assistant United States Attorney
Telephone: 791-1147

Enclosure

cc: Ms. Susan N. Herman
Prisoners' Legal Services of New York
100 Church Street
New York, New York 10007

March 30, 1977

The Honorable Charles M. Metzner
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Enright v. United States, 77 Civ. 449

Dear Judge Metzner:

In response to the Government's letter of March 18, petitioner has no objection if the Court wishes to await the Second Circuit's decision on the petition for rehearing and rehearing en banc pending in United States v. Ford, Dkt. No. 76-1319, slip op. 1681 (2d Cir., February 3, 1977).

Petitioner does wish to draw the Court's attention to the fact that a decision on the retroactivity of United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), is not a necessary component of a ruling on this motion to vacate sentence. In Mauro, the Court of Appeals held that the Interstate Agreement on Detainers ["the Agreement"] is the exclusive means by which the United States may obtain custody of a state prisoner, and that the Government, therefore, is bound by the provisions of the Agreement even when it acquires custody exclusively by issuance of a writ of habeas corpus ad prosequendum. In the instant case, as in Ford, the Government did not proceed solely by writ -- the writs of habeas corpus in each of these cases were issued after an actual detainer had been lodged with the state prison. Petitioner respectfully urges the position set forth in the moving papers herein, that regardless of the decision in Mauro, the Government was bound to follow the Agreement when it proceeded by detainer. This was the position taken by the Court of Appeals in Ford -- the Court specifically stated that it was not necessary to decide whether the writ issued therein constituted a detainer, under the rationale of Mauro, because an actual detainer had been lodged. United States v. Ford, supra at 1685-86.

The Mauro decision, in the context of the instant motion, merely presents a second and alternative ground for arriving at the same result: the Government was bound by the Agreement, first, because it proceeded by lodging a detainer, and

The Honorable Charles M. Metzner
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

March 30, 1977 Page 2

also, under the theory of Mauro, because the writs of habeas corpus ad prosequendum issued themselves constitute detainers within the meaning of the Agreement. If the Court wishes to consider the latter alternative, I would be glad to submit a memorandum on the question of whether Mauro should be applied retroactively.

Petitioner also respectfully submits that no question of retroactivity is posed by the Court of Appeals' assertion in Mauro that the United States is a "receiving state" within the meaning of the Agreement. This statutory interpretaion was not a novel ruling of law, but merely a rejection of the Government's ex post facto attempt to limit its participation by rewriting the Agreement. As the Mauro Court pointed out, the definition of "State" in Article II(a) of the Agreement expressly includes the United States; "[t]he statute places the United States on the same footing as any State which is a signatory to the compact;" "[t]here is admittedly nothing at all in the Agreement to support the distinction proffered by the Government [attempting to limit participation of the United States as a sending state only];" and, "the Agreement in clear and unequivocal language commits the United States to all of its terms including Article IV." Id. at 593-94. Mauro simply recognized Congress' clear intent that the United States be bound by the Agreement as a receiving as well as a sending state from the date of enactment of the Agreement in 1970.

Petitioner therefore urges that his claim under Article IV(c) of the Agreement does not necessitate any ruling on retroactivity, and that the only issues this Court need decide are the procedural and waiver questions already discussed in petitioner's memorandum in reply.

Respectfully yours,

SUSAN N. HERMAN
Attorney for Petitioner
Prisoners' Legal Services of New York
100 Church Street - 18th floor
New York, New York 10007
(212) 285-0386

SNH/kls

---

cc: Hon. Robert B. Fiske, Jr.
United States Attorney for
the Southern District of New York
1 St. Andrews Plaza
New York, New York 10007

Att: Jeffrey I. Glekel, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

ROBERT J. ENRIGHT, :

Petitioner, :

-against- : 77 Civ. 449 (CMM)

UNITED STATES OF AMERICA, :

Respondent. :

- x

METZNER, D. J.:

This is an application for a writ of habeas corpus by a federal prisoner.

The petitioner was found guilty after trial for armed bank robbery and a 20-year sentence was imposed. The presentence report showed two prior convictions for robbery and grand larceny respectively, with prison terms imposed. The conviction was affirmed without opinion after counsel was relieved because of inability to show a nonfrivolous ground for appeal. Petitioner now claims that his rights under the Interstate Agreement on Detainers (18 U.S.C. App.) have been violated and the indictment should be dismissed. A review of the pertinent chronology is necessary to put the claim into focus.

On November 15, 1974, an arrest warrant on a complaint issued by a magistrate of this court was lodged as a detainer at the Greenhaven Prison where petitioner was in state custody serving a sentence for violation of

parole. By December 2, 1974, he knew of the existence of the detainer. On December 15, 1974, he wrote to the magistrate requesting a speedy trial of the charges. It appears that the indictment had already been filed on December 10 and ordered sealed. It was unsealed on December 18, a bench warrant was issued, and an application was made for a writ of habeas corpus ad prosequendum on December 24, returnable December 30.

On December 30, 1974, petitioner was produced in this court pursuant to the writ. He pled not guilty to the indictment charging bank robbery (74 Crim. 1152) and the case was then assigned to me.

On January 24, 1975, the writ was satisfied by Judge Frankel. This was done, according to the Assistant United States Attorney handling the case, following a telephone call from petitioner's privately retained counsel in which the latter requested that petitioner be returned to state custody pending trial. The Assistant United States Attorney replied that he intended to keep petitioner here pending trial unless Enright specifically requested that he be returned to Greenhaven. Counsel assured the Assistant that he was conveying petitioner's request and the Assistant complied [illegible] had the writ marked satisfied that day.

On January 27, 1975 this court, without knowledge of the above events, sent written notice to counsel fixing a trial date for February 20, 1975. This was done because defendant was a jail case and an early trial was indicated. Petitioner's counsel requested an adjournment to February 24 and the trial went forward on that date.

Petitioner denies he ever requested that he be returned to state custody. His counsel has submitted an affidavit stating that he has no recollection of having discussed this matter with the Assistant or with his client and he knows of no reason why his client should have desired to be transferred to state custody before trial.

The law is clear that the requirements of the Interstate Agreement on Detainers apply to writs of habeas corpus ad prosequendum, and that the agreement is violated if the prisoner is returned to state custody without first being tried on the pending federal charge. United States v. Ford, 550 F.2d 732 (2d Cir. 1977); United States v. Mauro, 544 F.2d 588 (2d Cir. 1976).

This right is waivable. United States v. Ford, supra at 742. However, petitioner raises a question as to whether the right was waived and an evidentiary hearing is necessary to determine that issue.

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The hearing shall proceed in Courtroom 443 of this courthouse at 4:30 P.M. in the afternoon of June 9, 1977. A writ of habeas corpus ad testificandum may be obtained from my chambers.

So ordered.

Dated: New York, N. Y.
May 24, 1977

Charles H. Tenney
U. S. D. J.

(11)

d Mgr. Schwartz
74-1679

A 91

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT J. ENRIGHT,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

77 Civ. 449 (CMM)

PETITIONER'S PREHEARING MEMORANDUM

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT J. ENRIGHT,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

77 Civ. 449 (CMM)

PETITIONER'S PREHEARING MEMORANDUM

THE BURDEN OF PROOF AT THE EVIDENTIARY HEARING TO BE HELD IN THIS PROCEEDING, IS ON THE GOVERNMENT, TO PROVE A WAIVER BY A PREPONDERANCE OF THE EVIDENCE.

The Court has ordered an evidentiary hearing in this case, to establish whether petitioner has waived his rights under Article IV(e) of the Interstate Agreement on Detainers, 18 U.S.C. App. (1970).

Since the subject of the hearing is whether there has been a waiver, petitioner respectfully submits that the burden of proof is on the Government, to prove a waiver by a preponderance of the evidence.

In United States v. Mauro, 544 F.2d 588, 591 n.3 (2d Cir. 1976), petition for certiorari pending, the Second Circuit specifically stated that the standard to be used to judge whether there has been a waiver of rights under Article IV(e) is the standard set forth in Johnson v. Zerbst, 304 U.S. 458, 464 (1938): whether the act claimed to constitute a waiver was "an intentional relinquishment or abandonment of a known right or privilege."

In Carnley v. Cochran, 369 U.S. 506 (1962), the Supreme Court held that the burden of proof under the Johnson v. Zerbst waiver standard is on the Government, to prove waiver by a preponderance of the evidence. The Court expressed its belief that to impose the burden of disproving waiver on the individual claiming a violation of his rights would be "wholly at war" with the standard of proof announced in Johnson v. Zerbst, supra. See also Mitchell v. United States, 482 F.2d 289, 294-97 (5th Cir. 1973) (holding that the burden of proof to show waiver of a claim under United States v. Tucker,* is on the Government -- to prove waiver by a preponderance of the evidence).

TO MEET ITS BURDEN OF PROOF, THE GOVERNMENT MUST SHOW THAT PETITIONER PERSONALLY REQUESTED A TRANSFER TO STATE CUSTODY, AND THAT SUCH REQUEST WAS A VOLUNTARY RELINQUISHMENT OF A KNOWN RIGHT.

In Mauro, supra, the Second Circuit found that appellee Fusco had requested a transfer to state custody while awaiting

* 404 U.S. 443 (1972).

his federal trial. Nevertheless, the Court found that Fusco had not waived his right to challenge this transfer under Article IV(e), because his request had not been shown to have met the Johnson v. Zerbst standard. Because the record did not reflect whether the request was a voluntary relinquishment of a known right, the District Court's dismissal of the indictment against appellee Fusco, under Article IV(e), was upheld.

In addition to being required to show that petitioner personally requested his return to state custody, therefore, the Government is also required, under Mauro, to prove by a preponderance of the evidence that any such request was made with knowledge of the rights engendered by Article IV(e) of the Interstate Agreement on Detainers.

Respectfully submitted,

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Hon. Charles M. Metzner
United States District Judge
United States Courthouse
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New York, New York 10007
ATT.: Joseph Loonan

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROBERT J. ENRIGHT, :

Petitioner, :

: POST-HEARING MEMORANDUM

UNITED STATES OF AMERICA, : 77 Civ. 449 (CMM)

Respondent. :

----------x

I. SUPPLEMENT TO GOVERNMENT'S MEMORANDUM OF LAW

Quoting Stone v. Powell, 428 U.S. 465 (1976), the Second Circuit recently reiterated that Section 2255 collateral review is only available in exceptional circumstances and if an alleged error is constitutional or results in a complete miscarriage of justice. Alfano v. United States, Dkt. No. 77-2013, slip op. 4079 (2d Cir. June 8, 1977). In any case, non-constitutional claims which would have been reviewed on direct appeal "may not be asserted in collateral proceedings." Stone v. Powell, 428 U.S. 465, 477 n.10 (1976). The present claim is not constitutional, could have been asserted on direct appeal, and is a procedural point unrelated to the fundamental fairness of the trial. See also DelVecchio v. United States, Dkt. No. 76-2165, slip op. 3719, 3728 (2d Cir. May 24, 1977) (28 U.S.C. § 2255 unavailable for violation of Fed. R. Crim. P. Rule 11 unless prejudice is shown).

DC:jw
06-2924

With only one exception,* Southern District Courts, while not explicitly holding 28 U.S.C. §2255 inapplicable to the Interstate Detainer Act (Act), have declined to grant collateral relief for alleged violation of that legislation. See United States v. Pierre, Dkt. No. 76-1462 (S.D.N.Y., Oct. 21, 1976)(Tenney, J.); United States v. Lee, 76 Cr. 552 (S.D.N.Y., Aug. 16, 1976)(Goettel, J.); United States v. Brown, 76 Cr. 244 (S.D.N.Y., July 15, 1976)(Metzner, J.).

Finally, the government would like to note again that the defendant waived his rights under the Act in two entirely distinct ways. First, the defendant's rights were waived when his attorney explicitly requested the transfer to the State prison. Second, Enright waived any rights he might have had under the Act by failing to assert them before or during his trial, or on appeal.

II. GOVERNMENT'S REQUESTED FINDINGS OF FACT

(1) Gordon Lang, attorney for defendant Enright, requested that the United States Attorney permit the defendant to return to state custody and represented that this request originated with Enright.

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* Heirmerle v. United States, 75 Civ. 5563 (S.D.N.Y., Dec. 15, 1976). Judge Brieant is currently reconsidering Heimerle due to the fact that the decision was rendered without the benefit of government papers.

(2) But for what he believed was a request by Enright to be returned to state custody pending trial, Assistant United States Attorney Jeffrey I. Glekel would not have arranged his return.

(3) Defendant Enright did, in fact, request to be returned to the Green Haven Correctional Facility.

(4) The defendant failed to raise a claim under the Interstate Detainer act either before or during trial or on appeal.

(5) Defendant Enright was not prejudiced by his return to state custody pending trial in federal court.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

DENISE COTE
Assistant United States Attorney
- Of Counsel -

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PETITIONER'S POST-HEARING MEMORANDUM

ON THE EVIDENCE ADDUCED AT THE EVIDENTIARY HEARING HELD HEREIN, PETITIONER SHOULD BE FOUND NOT TO HAVE WAIVED HIS CLAIM UNDER ARTICLE IV(e) OF THE INTERSTATE AGREEMENT ON DETAINERS.

I. The Evidentiary Hearing

Pursuant to a decision dated May 24, 1977, this Court held an evidentiary hearing on June 13, 1977, in order to determine whether petitioner had waived the rights under Article IV(e) of the Interstate Agreement on Detainers which formed the basis for petitioner's motion to vacate his sentence, under 28 U.S.C. §2255. At the hearing, petitioner

Robert J. Enright and Assistant United States Attorney Jeffrey Glekel testified. The parties stipulated, at the Government's request, that petitioner's trial counsel on federal indictment number 74 Cr. 1152, Gordon Lang, if called, would have testified in the manner indicated by his affidavit, previously submitted.

To summarize the testimony briefly,* petitioner testified 1) that he never requested that he be returned to state custody prior to his federal trial on 74 Cr. 1152; 2) that he never discussed the subject of a transfer with his attorney, Gordon Lang; 3) that he did not wish a transfer to state custody, a) because, as shown by his request for a speedy trial dated December 15, 1974, he actively desired and sought a speedy resolution of the federal charges, and b) because he had been in the segregation unit while in state custody, and was required to return to segregation for an indefinite period of time upon his return to state custody; and 4) that he was not advised of his rights under the Interstate Agreement on Detainers, and did not become aware of his rights under Article IV(e) thereof until he read a newspaper article about Judge Bartels' decision in United States v. Mauro, decided May, 1976.

Mr. Glekel testified that he had received a telephone call from Gordon Lang, petitioner's trial attorney, on

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* A transcript of the hearing is attached. References to the hearing minutes hereinafter will be cited as "HM."

January 24, 1975, and had transferred petitioner to state custody in reliance on Lang's statements.

Mr. Lang's affidavit states 1) that he has no independent recollection of the January 24, 1975 telephone call; 2) that he does not recall petitioner ever having requested that he be returned to state custody; 3) that he does not recall ever having discussed the subject of a transfer with petitioner; and 4) that he knows of no reason why petitioner would have desired to be returned to state custody prior to his federal trial.

II. The Court's Finding of Fact

The Court found, at the end of the hearing, that "the Government took its action [returning petitioner to state custody untried on January 28, 1975] on the representations made to it by privately retained counsel, an action which the Government would not have taken but for the representation of privately retained counsel." HM at 46. The Court did not make any findings of fact relating to petitioner Enright's testimony.

III. The Question Presented

A. The Claim Under Article IV(e)

Petitioner's claim on the merits was clearly established at the hearing, on the testimony of the Government's witness. Mr. Glekel testified that he effected petitioner's transfer back to state custody at the end of January, 1975, prior to petitioner's trial on federal indictment no.

74 Cr. 1152, by asking that the writ of habeas corpus by which petitioner had been produced be satisfied. HM at 40-42. As the Second Circuit set forth in United States v. Mauro, 544 F.2d 588, 591 n.3 (2d Cir. 1976), petition for certiorari pending, all that is required to state a claim under Article IV(e) is to "allege that one jurisdiction has requested [a defendant's] transfer from another jurisdiction for trial and returned him without trying him to the first jurisdiction. United States v. Cappucci, 342 F.Supp. 790, 793 (E.D.Pa. 1972)." See also United States v. Cyphers & Ferro, Dkt. No. 76-1131, slip op. 1737, 1745 (2d Cir., February 8, 1977) (holding that a return to state custody prior to trial on a pending Federal indictment "is not an 'orderly disposition' of [defendant's] federal case and violates Article IV(e).").

As these two Second Circuit decisions demonstrate, Article IV(e) is violated by the simple act of retransfer prior to trial, because "Article IV(e) creates no exceptions to the requirement that the defendant not be returned to state custody untried." Mauro, supra at 592 n.6, citing United States v. Ricketson, 498 F.2d 367, 373 (7th Cir.), cert. denied, 419 U.S. 965 (1974).* Because there are no exceptions to the requirement of Article IV(e), the impetus

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* Because Article IV(e) is violated by the simple act of retransfer, it is not necessary for petitioner to allege prejudice. The question of specific prejudice was not considered by the Second Circuit in any of the cases in this area.

for the Government's action in effecting a prohibited transfer, or the good or bad faith underlying such action, simply is not relevant in deciding whether Article IV(e) has been violated. To state that Article IV(e) is violated only by an action undertaken in bad faith, or unjustifiably, would be to amend the statute enacted by Congress. See Mauro, supra at 592 n.7, 594.

Therefore, once petitioner has established that he was returned to state custody untried, he has established a per se violation of Article IV(e). On this showing, the Court is required to dismiss the indictment with prejudice, under the clear terms of Article IV(e) and the Second Circuit case law unless, as in United States v. Ford, 550 F.2d 732 (2d Cir. 1977), the claim has been waived. As will be demonstrated below, waiver is judged by the actions of the petitioner, and not by the good or bad faith of the Government.

Since petitioner has established his claim on the merits and the Government has alleged a waiver, the question now before the Court is, as the Court's decision of May 24 indicates, whether petitioner waived his claim.

At the conclusion of the evidentiary hearing, the Court posed the question "whether the motion has to be granted despite the Government having been misled by privately retained counsel and taken an action which ordinarily [it] would not have taken." HM at 46. Petitioner submits

that the answer is an unequivocal yes. Second Circuit case law has established that the elements of a violation of Article IV(e) are no more than what petitioner has already proven: that he was returned to state custody prior to his federal trial. Petitioner further submits that his claim has not been waived, because on the basis of the Court's finding of fact, and the balance of the evidence adduced at the hearing, no effective waiver has been or can be found, for the reasons described below.

B. Waiver

1. The Standard

The Second Circuit has clearly set forth the standard to be applied in deciding wheither a waiver of the rights guaranteed by Article IV(e) of the Interstate Agreement on Detainers has occurred. In Mauro, supra, the Government contended that appellee Fusco had waived his rights under Article IV(e). The Court of Appeals responded that for any action of Fusco's to have been effective as a waiver "it must have been an 'intentional relinquishment or abandonment of a known right or privilege.'" Id. at 591 n.3, quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

The application of the Johnson v. Zerbst waiver standard has been explored in numerous cases, including Mauro, and the elements of an effective waiver thus are well-known. First, an effective waiver must be personal. "[T]he [Johnson v. Zerbst] standard here put forth depends on the considered choice of the petitioner . . . A choice made by

counsel not participated in by the petitioner will not automatically bar relief." Fay v. Noia, 372 U.S. 391, 439 (1963) (citations omitted).

Next, an effective waiver must be an intentional relinquishment of a known right. Johnson v. Zerbst, supra at 464; Mauro, supra at 591 n.3.

That the Government acted in good faith, on a representation by petitioner's counsel, does not in any way establish that petitioner personally and knowingly waived his rights. Petitioner has never contested the Government's good faith in effecting his transfer. Petitioner does assert, however, that any representation made by his attorney on the subject of his return to state custody was not authorized, and that petitioner was not aware of his rights under Article IV(e) and therefore could not knowingly waive these rights. To find an effective waiver under the Johnson v. Zerbst standard, the Court must find both that petitioner personally requested his return to state custody, and that petitioner did so with knowledge of his rights under Article IV(e).

a. Waiver Must Be Personal

As Fay v. Noia, supra, indicates, an effective waiver must be the choice of petitioner, and not of his counsel. Were this not so, the Johnson v. Zerbst standard would be rendered senseless: the question is not whether an attorney intentionally relinquished rights known to him, but whether petitioner did so.

The Supreme Court recently reaffirmed the holding in Fay, supra, stating that an effective waiver

> . . . must be the product of an understanding and knowing decision by the petitioner himself, who is not necessarily bound by the decision or default of his counsel.

Humphrey v. Cady, 405 U.S. 504, 517 (1972). Applying the waiver standard set forth in Fay and Johnson v. Zerbst, the Supreme Court further explained that in a hearing on waiver, the District Court must determine first, the reason for counsel's action, and second,

> . . . the extent of petitioner's knowledge and participation in that decision. If the District Court cannot find persuasive evidence of a knowing and intelligent waiver on the part of petitioner himself, then the Court should proceed to consider [petitioner's claim on the merits].
>
> Id.

Numerous lower courts have also found that it is necessary to examine purported waivers by counsel, to determine the extent of the petitioner's participation in counsel's decision, and thereby to determine whether there has been an effective waiver. In Gates v. Henderson, Dkt. No. 76-2065, slip op. at 1357 (2d Cir., January 12, 1977) (rehearing en banc pending), the Court of Appeals ruled that the question of whether there has been an effective waiver of rights depends on whether "the habeas petitioner -- assisted by counsel but making the final decision himself -- 'understandingly and knowingly forewent the privilege . . .'"

Quoting Fay, supra.* See United States ex rel. Snyder v. Mazurkiewicz, 413 F.2d 500, 502 (3d Cir. 1969) (examining the extent of petitioner's role in counsel's choice in order to decide whether there had been an effective waiver); Floyd v. United States, 365 F.2d 368, 377 n.15 (5th Cir. 1966) (stressing that a waiver must be by petitioner's choice); Cobb v. Balkcom, 339 F.2d 95, 101-02 (5th Cir. 1964) (holding that counsel's failure to confer with his client before deciding not to challenge the composition of the grand jury rendered counsel's purported waiver ineffective); United States ex rel. Eidenmuller v. Fay, 240 F.Supp. 591, 594 (S.D.N.Y. 1965), cert. denied, 384 U.S. 964 (1966) (decision of counsel does not show a "considered choice of petitioner"); United States ex rel. Alexander v. Fay, 237 F.Supp. 142, 148 (S.D.N.Y. 1965) (questioning whether a purported waiver was due to a "considered choice of petitioner"); United States ex rel. Noll v. Fay, 219 F.Supp. 262 (S.D.N.Y. 1963); cf. Paine v. McCarthy, 527 F.2d 173 (9th Cir. 1975), cert. denied, 424 U.S. 957 (1976).

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* As the Second Circuit noted in Gates, supra, at 1357-60, an attorney's action in defaulting on an objection during trial may, if found to be a reasoned, strategic decision, bind the client. However, as shown by United States ex rel. Fazio v. Fay, 348 F.2d 418 (2d Cir. 1965), cert. denied, 383 U.S. 938 (1966), the Court must be able to satisfy itself that there were adequate strategic reasons underlying the attorney's decision in bypassing a trial-type right, before a waiver may be found even on this ground. The right claimed herein is personal, not a matter of trial.

In Mitchell v. Stephens, 353 F.2d 129 (8th Cir. 1965), the Court considered a waiver question remarkably similar to the question posed in the instant case. Petitioner's attorney represented to the state trial court, during the course of the trial, that petitioner did not wish to challenge the voluntariness of his confession. Without petitioner being present, counsel told the court that his client conceded that he had been well-treated by the police officers to whom he had confessed. In a federal habeas corpus proceeding, petitioner alleged and testified, that his confession had been coerced. The District Court found that petitioner's counsel, by his actions, had waived this claim, and therefore declined to consider the claim on the merits.

Writing for a unanimous panel, Judge (now Justice) Blackmun reversed the finding of waiver, chiefly on the ground that there had been no showing that counsel's representation had been the "considered choice of petitioner," as required by the Johnson v. Zerbst and Fay v. Noia standard. Mitchell, supra at 140. The Court particularly noted the fact that there had never been any personal expression of waiver by petitioner. Id. at 141. Because there was no basis on which the District Court could have found that petitioner himself had knowingly waived his rights, the Court remanded the case for a hearing on the merits of petitioner's claim, or a new trial.

The representation made by petitioner's counsel herein is fully analogous to counsel's statement to the state court in Mitchell. It was not, of course, dispositive of petitioner Mitchell's claim that the state court had acted in good faith, on the representation of Mitchell's counsel, in failing to consider the voluntariness of Mitchell's confession. What was persuasive to the Eighth Circuit was that there was no basis for finding that Mitchell had personally waived his claim, because there was no showing that he had participated in his counsel's decision.

Similarly, there is not a shred of evidence in this case tending to show that petitioner ever authorized his counsel to request his return to state custody. The only evidence existing on this issue shows that there was no such request. First, counsel states that he does not recall petitioner having made such a request, and knows of no reason why petitioner would have desired to return to state custody. (Lang affidavit). Second, petitioner testified that he never made any such request [HM at 15, 27] and that his counsel did not consult with him before, or even after, telephoning the Assistant United States Attorney [HM at 15-17, 19-2[illegible]. Petitioner testified that his contacts with counsel, retained for him by his father, were very minimal -- approximately one and a half hours in January, 1975 -- [HM at 13-15] and that the subject of a transfer never came up in these brief discussions [HM at 15].

Petitioner's testimony that he did not ask his counsel to effect his return to state custody is bolstered by documentation showing that petitioner had no reason to wish to return to state custody, and every reason to wish to remain in federal custody.* First, petitioner had already requested a speedy disposition of the federal charges against him, by letter of December 15 (attached as an exhibit to the moving papers). This request shows that petitioner desired and sought a prompt federal trial. His return to state custody was not likely to expedite, but rather to delay his trial. Petitioner also established, by his testimony and by records from the New York State Department of Correctional Services, that before being transferred to federal custody, petitioner had been in the segregation unit at Green Haven. On his return to state custody, petitioner was required to return to the segregation unit for an indefinite period of time. [HM at 5-9, Exhibits 1 and 2]. As the Court noted at the hearing, it can be assumed that "nobody

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* At the hearing, the Court questioned whether New York State credits prisoners in the temporary custody of another jurisdiction with the time they are spending in custody. New York Penal Law §70.30, governing the computation of sentences of state prisoners, provides that the running of time on an indeterminate sentence is interrupted only if a prisoner escapes or absconds from custody [§70.30(6) and (7)]. Section 70.30(2-a) authorizes the service of a term of imprisonment in an institution under the aegis of another jurisdiction. It is the practice of New York State, under these provisions, not to consider a sentence interrupted when another jurisdiction takes temporary custody of a state prisoner. If the Court desires, petitioner will obtain from the Department of Correctional Services a calculation of petitioner's sentence showing that no interruption of the sentence occurred when petitioner was in temporary federal custody.

wants to return to segregation." HM at 19. Thus, it is simply not believable that petitioner would have gone out of his way to request a return to state custody and thereby to the rigorous conditions of confinement in a punitive segregation unit.

There is thus, ample basis for a finding that petitioner did not authorize his counsel's representations to the Government. Petitioner respectfully requests the Court to find as a matter of fact that he did not authorize his attorney to request his return to state custody.

Conversely, there is absolutely no basis in the record for finding that petitioner did authorize any representation made by his counsel. Petitioner respectfully submits that whether or not the finding of fact requested above is made, there is no showing that petitioner personally waived his rights under Article IV(e).

b. Waiver Must Be Knowing and Intelligent

The Johnson v. Zerbst standard applied by the Second Circuit in Mauro, supra, specifies that an effective waiver must be an "intentional relinquishment or abandonment of a known right or privilege." Id. at 591 n.3. Even if a petitioner has personally waived a claim, under this standard the waiver is not effective unless petitioner knew of his rigths at the time the purported waiver occurred.

The Second Circuit addressed this facet of the Johnson v. Zerbst standard in Mauro, supra. Appellee Fusco, in that

case, claimed a violation of his rights under Article IV(e) of the Interstate Agreement on Detainers. The Court found that Fusco had personally, in open court, requested a return to state custody prior to his federal trial. Thus, the Court had one assurance lacking here -- that Fusco had personally requested a transfer. Nevertheless, the Court found that Fusco had not waived his rights because the record was "barren of any indication" that Fusco's request had been an intentional relinquishment or abandonment of a known right. Id. at 591 n.3.

Judge Brieant recently granted a motion to vacate sentence based on an alleged violation of Article IV(e), in Heimerle v. United States, 76 Civ. 556 3 (S.D.N.Y. 1976) (unreported). In considering whether the claim had been waived, he stated:

> Waiver is the intentional relinquishment of a known right. Prior to the decision of Judge Bartels on May 17, 1976, who could have known?
>
> Id. at 5.

As Judge Brieant so succinctly states, the application of Article IV(e) to Federal prosecutions was not generally known until Mauro was decided. Petitioner testified that he was never advised, and did not know of the provisions of Article IV(e) until after he read about the Mauro decision, a year after his trial and appeal were over [HM at 21]. He testified that the notification of detainer he received did

not include any mention of these provisions,* and that his attorney did not advise him of his rights under Article IV(e). HM at 15, 21. Mr. Glekel did not advise petitioner of his rights. HM at 42. Petitioner also testified that he did not wish to return to state custody, [HM at 17] but submitted to the transfer at the end of January because he "wasn't that familiar with federal procedures." HM at 24. When notified of his right to request a speedy disposition of the federal charges against him, petitioner had exercised that right, because he wished a prompt resolution. Since petitioner has shown that he is capable of claiming rights known to him, his failure to protest the undesired transfer to his attorney or to the court indicates that he was simply unaware that he had a right to remain in federal custody until he was tried.

Petitioner therefore submits that there is ample basis for the Court to find that he was not aware of his rights under Article IV(e) at the time of the purported waiver, and respectfully requests that the Court so find.

Again, even if the Court does not enter the finding requested, there is absolutely no basis for a finding or inference that petitioner did know of his rights under Article IV(e), since the sole evidence on this point was petitioner's testimony. Since petitioner did not know of his rights, he cannot be found to have intentionally relinquished or abandoned a known right.

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* At the hearing the Court requested a transcription of this notification, since the copy was barely legible. A transcription of the notification (Exhibit 1A] is appended.

c. Any Waiver Should Have Been in Open Court

Article IV(c) of the Interstate Agreement provides that any request for an adjournment of a proceeding made possible by the Agreement must be made in open court. Richard Ford, the subject of the decision in United States v. Ford, supra, made his request to be returned to state custody in open court. See Appellant's reply brief in Ford, at 6. Thus, the court was assured that Ford's request was personal, and had full opportunity to satsify itself that Ford's request was knowing and voluntary. On this basis, a waiver could be found in Ford. Similarly, appellee Fusco in Mauro, supra, also entered his request for a return to state custody in open court, so the court at least was assured that the request emanated from Fusco, even though the court was not satisfied that the request was knowing.

The advisability of this procedure is demonstrated by the instant case, where a retrospective determination concerning petitioner's actions and knowledge must be made. At the hearing, Mr. Glekel admitted that he did not ask that petitioner be produced in open court in connection with the satisfaction of the writ of habeas corpus ad prosequendum, [HM at 41-42] and that he did not notify this Court that petitioner was being returned to state custody, although he was aware that the case had been assigned for all purposes. HM at 42. Thus, the Court had no opportunity to determine at the time whether petitioner wished to return to state custody,

and whether he was aware of his right to remain in federal custody pending his trial.

The Federal Rules of Criminal Procedure demonstrate a strong policy favoring the procedure followed in Ford and in Fusco's case. The rules reflect a judgment that any waiver of important rights should be effected in open court, or at least in a writing signed by the defendant himself, so that the court may be assured that the defendant wishes to waive his rights. Compare F.R.Crim.P. Rule 7 (waiver of indictment must be in open court, after defendant is advised ofhis rights); Rule 10 (arraignment in open court); Rule 11(c) and (d) (plea of guilty in open court, with allocution); Rule 11(e) (plea agreement must be disclosed in open court, and can be rejected only in open court); Rule 20 (waiver of trial in the district where indictment is pending must be in writing and signed by defendant); Rule 23(a) (jury trial can be waived only in open court); cf. Rule 23(b) (jury of less than 12); Rule 31 (verdict in open court); Rule 32 (right of personal allocution); Rule 43 (right to be present at trial).

Thus, the problem posed in this case was created not only by an unauthorized action of petitioner's counsel but also by the Government's failure to take minimal precautions to enable the Court to determine whether petitioner himself desired his return to state custody. Although characterizing the transfer as a departure from usual procedure [HM at 34],

the Government also made no attempt to ascertain whether petitioner knew of his right to remain in federal custody.

C. Burden of Proof

At the beginning of the hearing, the Court ruled that the burden of proof at the hearing was on petitioner. Petitioner, of course, does have the burden of proof to establish a violation of Article IV(e), under 28 U.S.C. §2255. As is discussed above, at pages 3-5, petitioner has satisfied this burden by the documents attached to the moving papers, and by the testimony of the Government's own witness at the hearing. The Government has never contested that petitioner has stated a claim for relief on the merits -- the Government raises the affirmative defense of waiver.

If the Court's ruling was intended to apply to the burden of proof on waiver, as well as to the burden of proof on petitioner's claim on the merits, petitioner respectfully reqests that the Court reconsider its ruling.

In habeas corpus proceedings, the burden is generally on the respondent to establish affirmative defenses, such as waiver, Carnley v. Cochran, 369 U.S. 506 (1962), or abuse of the remedy, Sanders v. United States, 373 U.S. 1, 10-11 (1963); United States v. Brown, 417 F Supp. 340, 342 n.6 (E.D.Pa. 1976). This is certainly true where the Johnson v. Zerbst standard is applicable, as it is here. In a post-conviction claim of denial of the right to counsel, for example,

petitioner has the burden to establish that he did not have counsel at a proceeding where he was entitled to counsel. If he establishes this, according to the Second Circuit in United States ex rel. Jefferson v. Fay, 364 F.2d 15 (2d Cir. 1966), cert. denied, 385 U.S. 1027 (1967), the burden then shifts to the respondent to show that petitioner was advised of and waived his right to counsel. If the respondent satisfies this burden by showing that petitioner personally stated that he did not want counsel, only then does the burden revert to the petitioner, who then has the opportunity to establish that the demonstrated waiver was not voluntary, or intelligent. See also United States ex rel. Lasky v. LaVallee, 472 F.2d 960 (2d Cir. 1973).

Since petitioner has met his burden herein of establishing a per se violation of Article IV(e), the burden is on the Government to show that the claim was waived by petitioner.

The situation of appellee Fusco, in Mauro, supra, demonstrates that the burden of proof to show a waiver of rights under Article IV(e) is on the Government. Despite the fact that Fusco had personally requested a return to state custody, the Court of Appeals found that Fusco's claim should prevail on the merits, because the record was "barren of any indication" that this purported waiver was knowing and intelligent. If the burden of proof had been on Fusco to demonstrate lack of waiver, his claim could not have prevailed on a silent record. Therefore, the fact that the Court of Appeals ruled in Fusco's

favor demonstrates that the Government was charged with the burden of showing waiver.

Mauro must be read as imposing the burden of proof on waiver on the Government first, by the action the Court took with respect to appellee Fusco, and second, because of its invocation of the Johnson v. Zerbst standard as the standard by which a waiver of claims under Article IV(e) is to be judged. A simple corollary to the Johnson v. Zerbst standard is the Supreme Court's clear ruling in Carnley, supra, that where the Johnson v. Zerbst standard applies, the burden is on the Government to show waiver by a preponderance of the evidence.

IV. The Government's Position

In its post-hearing memorandum, the Government, as in its previous submissions, does not contest petitioner's claim on the merits; neither has the Government offered any support for its claim that the misleading representation made by petitioner's counsel in itself constitutes a waiver of petitioner's claim. Rather, the Government urges again that this Court decline to review petitioner's claim on the merits at all.

Petitioner submits that Judge Brieant's decision in Heimerle, supra,* and the Third Circuit decision in United

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* Although the Government states that the Heimerle decision is being reconsidered, the docket sheets do not reflect this, and the case is considered closed by the Clerk's office.

States ex rel. Esola v. Groomes, 520 F.2d 830 (3d Cir. 1975) show that this claim is properly raised in a post-conviction motion. Petitioner also submits that the importance of the right guaranteed by Article IV(e) has been determined by Congress, and therefore is not to be disregarded. Further, regardless of the Court's conclusions about the validity of the Government's contentions, the considerations urged by the Government, as petitioner has pointed out in previous submissions, are not jurisdictional and pose no bar to consideration of petitioner's claim on the merits under 28 U.S.C. §2255. The recent cases cited by the Government represent no change in the law in this area.

Petitioner repsectfully wishes to direct the Court's attention to the discussion of this issue, and the other legal issues pressed by the Government, in petitioner's memorandum of law in reply.

CONCLUSION

Regardless of where the burden of proof lies, petitioner submits that there is no basis whatever for finding that he has waived his claim under Article IV(e). Waiver must be personal, knowing and intelligent, and there is no basis for finding that petitioner authorized his attorney's representations to the Government, or that petitioner knew of his rights under the Interstate Agreement at the time of the purported waiver. Petitioner therefore respectfully sub-

mits that the Court should consider his claim on the merits and find that, because he has established a clear violation of Article IV(e), he is entitled to dismissal of the indictment with prejudice.

Respectfully submitted,

SUSAN N. HERMAN
PIERCE GERETY, JR.
PRISONERS' LEGAL SERVICES
OF NEW YORK
(Attorneys for Petitioner)
100 Church Street - 18th Floor
New York, New York 10007
(212) 285-0370

Petitioner's Exhibit A
Transcription

DEPARTMENT OF CORRECTIONAL FACILITY

GREEN HAVEN CORRECTIONAL SERVICES

STORMVILLE, NEW YORK

NOTICE OF UNTRIED INDICTMENT, INFORMATION OR COMPLAINT AND OF RIGHT TO REQUEST DISPOSITION

Inmate Robert Enright No. 13409 Seg.

Pursuant to the provisions of Section 669-a of the Code of the Criminal Procedure, enacted/ by Chapter 10 of the Laws of 1957, you are hereby informed that the following untried/ Indictments, Informations or Complaints against you concerning which the undersigned [word illegible]/ and the source and contents of each:

State of New York, Southern District of New York, dated October 30, 1974, signed by Sol Schreiber, United States Magistrate, charging: Violation of U.S.C. Title 18, Section 2113 (a).

You are hereby further advised that by the provisions of said statute you have the right to/ request the District Attorney of the county in which any such Indictment, Information and Complaint/ is pending and the appropriate court that a final disposition be made thereof. You should then be brought/ to trial within 180 days after you have caused to be delivered to said District Attorney and said court/ written notice of the place of your imprisonment and your said request, together with a certificate of the/ Commissioner of Correction as more fully set forth in said statute. However, for good cause shown in/ open court in the presence of your counsel or yourself, the court having jurisdiction of the matter may/ grant any necessary or reasonable continuance.

Should you desire such a request for final disposition of any Untried Indictment, Information/ or Complaint, you are to notify the Head Clerk of the institution in which you are confined.

DATED: November 15, 1974

Peter Preiser
XXXXXXXXXXXXXXXXXXXX
COMMISSIONER OF CORRECTION

cc: Deputy Superintendent
Parole
Inmate
File

By /S/ Walter Fog
XXXXX
ACTING SUPERINTENDENT

RECEIVED

DATE 11-19-74

INMATE /S/ Robert Enright No. 13409

A 122

XXXXXXXXXX

USA 33s-475
(ED. 4-23-71)

PLAINTIFF'S

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

1(a) ID

FPI-MI—8-24-75-50M-4417

Robert Enrigh[illegible] 13409

State of New York, Southern District of New York, dated October 30, 1974 signed by Sol Schreiber, United States Magistrate, charging: Violation of U.S.C. Title 18, Section & 2113 ( ).

Peter Preiser
XXXXXXXXXXXXXXXX

November 15, 197[illegible]

cc: Deputy Superintendent
Parole
Inmate
File

XXXXX
ACTING SUPERINTENDENT

11-13-74
Attorney 13409

A 123

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ROBERT J. ENRIGHT,

Plaintiff,

v. : 77 Civ. 449

UNITED STATES OF AMERICA,

Defendant.

June 13, 1977
11:30 A.M.

B E F O R E :

CHARLES M. METZNER,

District Judge.

A P P E A R A N C E S :

SUSAN HERMAN, ESQ.,
Attorney for the Plaintiff

ROBERT B. FISKE, JR., ESQ.,
United States Attorney for the
Southern District of New York
DENISE COTE, ESQ.,
Assistant United States Attorney

THE COURT: Ms. Herman?

MS. HERMAN: Your Honor, as I have submitted in the pre-hearing memorandum, I believe that the burden of proof is on the government at this hearing.

THE COURT: I don't think so. I think the burden of proof is on you.

You may proceed.

ROBERT J. ENRIGHT, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. HERMAN:

Q Mr. Enright, what is your age, please?

A Forty-three.

Q Could you speak up just a little?

A Sure.

Q Please state briefly your educational background.

A I have a high school diploma and forty-two college credits.

Q Where do you currently reside?

A Attica State Prison.

Q Are you incarcerated there under one or more

criminal convictions?

A Yes.

Q Is one of those the sentence you are challenging here on federal Indictment No. 74 Crim. 1152?

A Yes.

Q Are you currently serving any other sentences?

A Yes, I am, another concurrent sentence from the Eastern District and a state sentence.

Q Have you ever testified in your own defense at any trial?

A No.

Q Have you ever been charged with any offense involving perjury or falsehood?

A No.

Q Directing your attention to the sentence you are challenging on federal Indictment No. 74 Crim. 1152, when did you first become aware that you were suspected of the offense charged in that indictment?

A I'd say approximately the Spring of 1974. I was interviewed at the Ossining Correctional Facility by two agents of the FBI.

Q What happened then?

A I was shown some pictures and they took fingerprints, et cetera, and asked me if I had any knowledge

of this particular crime.

Q What was the next event or proceeding concerning 74 Crim. 1152?

A Approximately a month and a half later I was brought down to Federal Detention Headquarters on West Street and was asked to appear before a grand jury, and the following day did appear at a lineup at the FBI Headquarters.

Q Where were you brought down from?

A From Greenhaven at the time.

Q What if anything happened after the lineup?

A After the lineup I was returned to Greenhaven.

Q Approximately when was that?

A Maybe mid-June.

Q Were you participating in any vocational or educational programs at Greenhaven at that time?

A No.

Q How long did you remain at Greenhaven?

A After being returned?

Q Yes.

A I escaped from Greenhaven in October, 1974.

Q Were you subsequently apprehended?

A Yes.

Q When was that?

A Early November, 1974.

Q What happened then?

A What happened when I was apprehended?

I was returned to Greenhaven Prison.

Q Were you criminally prosecuted for escape?

A I was criminally prosecuted plus I had institutional charges for the escape.

Q Were you found guilty of the escape?

A Do you mean criminally?

Q Yes.

A Yes.

Q Were you also found guilty of the institutional proceedings?

A Yes.

Q What punishment, if any, did you receive as a result of the institutional proceedings?

A I received 60 days segregation with a review and 180 days lost time.

Q When you say with a review, could you please explain what you mean by that?

A That's sort of a procedure where after the 60 days you appear before an adjustment committee and they evaluate whether you should be there longer or whether you should be released.

THE COURT: Again, that was the administrative proceeding?

MS. HERMAN: Yes, that's right, your Honor.

THE COURT: I gather the witness says there was a criminal proceeding.

MS. HERMAN: There was a criminal proceeding also.

THE COURT: What happened to the criminal proceeding?

THE WITNESS: I was given two to four years.

Q Are you currently serving that sentence?

A Yes.

(Plaintiff's Exhibit 1 marked for identification)

MS. HERMAN: Could you please mark the last page 1-A since there are two different documents here.

(Plaintiff's Exhibit 1-A marked for identification)

Q Mr. Enright, I show you Petitioner's Exhibit No. 1 and ask you if you recognize that?

A This is the result of the disciplinary proceedings at Greenhaven.

Q That's the proceeding you just described?

A Right, yes.

MS. HERMAN: Your Honor, this is a certified copy of documents kept at the Attica Correctional Facility under the seal of the New York State Department of Correctional Services and attested to by the head clerk at Attica who is the custodian of these records.

At this time I offer it into evidence.

THE COURT: I gather this is the administrative proceeding regarding the escape?

MS. HERMAN: That's right, your Honor.

THE COURT: Any objection?

MS. COTE: Your Honor, my copy doesn't have any certification on it. If I could see that, I would appreciate it.

MS. HERMAN: Certainly.

(Handing)

MS. COTE: Government has no objection, your Honor.

(Government's Exhibit 1 received in evidence)

Q Mr. Enright, did you serve the sentence of confinement to the Special Housing Unit that was imposed at that proceeding?

A Well, actually it was interrupted in December

when I was brought down here to be arraigned on an indictment.

Q On what dates were you in the Special Housing Unit?

A Well, roughly from early November until the end of December, 197 -- until it was interrupted when I came here.

(Plaintiff's Exhibit 2 marked for identification)

MS. HERMAN: Your Honor, No. 2 is a record from the Greenhaven Correctional Facility including a copy of an original record kept at Greenhaven of a card showing Mr. Enright's cell locations during the months of November, 1974 until February of 1975 attested to by the head clerk at Greenhaven who is the custodian of these records.

At this time I offer this into evidence.

THE COURT: Any objection?

MS. COTE: If I may have a slight voir dire on this, your Honor.

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MS. COTE:

Q Mr. Enright, what does idle segregation mean?

Let me show you a copy of what has been marked as Plaintiff's Exhibit 2 for identification.

A I think idle segregation is usually a designation for actually where you are.

Q What kinds of facility is idle segregation?

A The idle, I imagine, is to indicate that you didn't have a job and segregation is just segregation, from the general population.

Q What is lobby?

A That's what they usually use when they refer you to being out to court.

Q What is the designation immediately preceding "lobby" on the second page?

A It looks like return from escape or otherwise that's return from escape and then segregation.

In other words, when I was returned from escape, they put me in segregation.

MS. COTE: Thank you very much.

No objection to the admission of this document, your Honor.

(Plaintiff's Exhibit 2 received in evidence)

BY MS. HERMAN:

Q Mr. Enright, directing your attention to the

proceedings on 74 Crim. 1152, did anything happen with regard to that proceeding while you were confined in the Special Housing Unit in segregation?

A Well, I recall being notified that a warrant had been lodged against me on that charge.

Q When did you receive that notification?

A I seem to recall it as being the end of November, maybe early December, 1974.

Q What did the notification say?

A Something to the effect that a warrant had been lodged, et cetera, and that I had a right to a speedy trial.

Q Mr. Enright, I show you Petitioner's Exhibit 1-A marked for identification and ask you if you recognize that?

MS. HERMAN: This is the last page of the documents that I have already given you as Exhibit 1.

A Yes, this is the notification that I received or a copy of it.

MS. HERMAN: This notification is included under the same seal of the Attica clerk, and I offer it into evidence.

THE COURT: It's already in, isn't it?

MS. HERMAN: I thought that only applied as

to 1.

(Plaintiff's Exhibit 1-A for identification received in evidence)

THE COURT: My only problem is I can't read this.

MS. HERMAN: The copy they sent me is not very legible. The copy they sent me is barely legible.

If the Court would like, I can have a transcription made.

THE COURT: Would you please.

Q At the time you received this notification, Mr. Enright, were you aware of the conditions of the interstate agreement on detainers?

A No, not at that time.

Q What if anything did you do after receiving the notification?

A I believe a few weeks later I wrote requesting a speedy trial.

Q What happened then?

A Well, maybe two weeks after that I was brought down and arraigned on the indictment.

Q Approximately when would that be?

A Near the end of December, 1974.

Q Where were you brought down?

THE COURT: We have a date that he wrote, December 15th. Don't you want that in the record.

Q On what date did you write to --

A It was mid-December.

THE COURT: Don't we have it?

MS. HERMAN: We have the speedy trial request.

A I think it was December 15th.

THE COURT: All right, I will take it.

Q At what date were you transferred down to West Street?

A The end of December, the 29th or 30th.

Q Were you still in the Special Housing Unit in segregation at Greenhaven on the date that you were transferred?

A Yes.

Q On that date, had you completed your sentence to the segregation unit?

A No, I had not.

Q Were you aware at that time that you owed the state more time in segregation on the institutional charge?

A I was aware that when I returned from federal jurisdiction I would return to segregation.

Q After you arrived at West Street, what was the next proceeding or event regarding 74 Crim. 1152?

A I was arraigned on the indictment.

Q Did you appear at that proceeding with an attorney?

A No, I am sure I didn't at that time.

Q Did an attorney represent you in the trial of 74 Crim. 1152?

A Yes.

Q Who was that?

A Gordon Lang.

Q How did Mr. Lang come to represent you?

A I spoke to my father and my father retained Mr. Lang.

Q When was that?

A It had to be, say, early January, 1975.

THE COURT: Gordon Lang?

MS. HERMAN: Lang, L-a-n-g.

Q Did you ever meet with Mr. Lang during January?

A Yes, I did. I'd say early January, say within the first ten days of January. He came to West Street to speak to me.

Q Did you have a discussion with him at that

time?

A Yes.

Q What subject or subjects did you discuss?

A We discussed the aspects of the case. I told him what I knew about it. He agreed to take the case, that he was going to check with the Court about a trial date or 3500 material, something to that effect.

Q Approximately how long was that discussion?

A Maybe an hour, an hour and a half.

Q Was anything else discussed during that conversation other than the trial preparation?

A No.

Q Did you have any other contacts with Mr. Lang during January of 1975?

A I believe once in the Eastern District Mr. Lang came to the bull pen and we had a few words there, maybe mid-January. He stopped at the bull pen and made mention of the fact that he was trying to get 3500 material and looking into a trial date.

Q How long was that discussion?

A Just a few minutes, maybe five, ten minutes.

Q Did you ever have any other contacts with Mr. Lang during January? Did you write to him or telephone him?

A I didn't write to him. It's possible that I might have phoned him. I don't recall.

Q During January, did you have any discussion with Mr. Lang concerning the location of your incarceration?

A The location?

Q Where you were.

A No, I didn't.

Q During January, did you ever discuss the subject of a transfer from West Street with Mr. Lang?

A No.

Q Did you ever discuss the subject of a transfer with anyone else?

A No, I didn't.

Q Did you ever ask Mr. Lang to effect your transfer from West Street?

A No.

Q Did Mr. Lang ever discuss with you the provisions of the interstate agreement on detainers?

A No, he didn't.

Q Did you ever tell Mr. Lang about your confinement to the Special Housing Unit at Greenhaven?

A Pardon me?

Q Did you ever tell Mr. Lang about your confinement to the segregation unit at Greenhaven?

A It's possible, but I don't -- I am not positive.

Q Have you ever read the affidavit in opposition submitted by Mr. Glekel, the Assistant U.S. Attorney in this proceeding?

A Yes, I have.

Q Do you recall what the subject of that affidavit was?

A Something to the effect that they had received a phone call from Mr. Lang near the end of January, and he was conveying my request to be returned to Greenhaven pending trial.

Q Did you have any discussion with Mr. Lang about the phone call described in this affidavit at any time?

A No, I didn't.

Q How long did you remain at West Street this time, Mr. Enright?

A I guess about three weeks, three and a half weeks.

Q When were you transferred out?

A Near the end of January 1975.

Q Do you remember the exact date?

A I know it was around the end, the 24th or

the 28th.

Q When did you first learn about this transfer?

A It appeared -- they have a court list that comes out that they put on the bulletin board. I saw my name there. They usually put WAB, usually it means you are being transferred with your belongings wherever you are going. In other words, it's not strictly to court.

Q At that time, did you ask anyone why your name appeared on that list?

A I spoke to a Mr. Gonzales in the record office. I explained I had court action and I didn't really want to be returned until the court action was finished.

He told me to come down the next morning, but don't bring my property and stuff with me.

THE COURT: You are going a little too fast for me.

You spoke to Mr. Gonazles where? Who is he?

THE WITNESS: Mr. Gonzales is -- at the time he was a civilian in the record office. I think he is a regular officer again now in West Street. He was in charge of cards, records, et cetera.

I spoke to him and he told me not to bring

my property down in the morning.

I went down in the next morning, I stayed there for the count. There was nothing they could do; they transferred me back anyway.

Q Did you appear in court in the Southern District of New York during January of 1975?

A No, I think the only time I appeared was the end of 1974 when I was arraigned in the indictment.

Q During the time while you were at West Street before this transfer at the end of January, did you ever appear before Judge Metzner?

A Would you repeat that, please?

Q During January, while you were at West Street, before your transfer back to Greenhaven, did you appear before Judge Metzner?

A No.

Q Where did you go when you were transferred from West Street at the end of January?

A I was returning to segregation in Greenhaven.

Q Would you please describe for the Court briefly the conditions of confinement in the Special Housing Unit at Greenhaven?

THE COURT: I don't think that's necessary under the interstate agreement. Either they violated or

they didn't. It has nothing to do with the state of the conditions of his confinement.

MS. HERMAN: Your Honor, I just thought the relevance of this was that the conditions in the Special Housing Unit at Greenhaven might have had some bearing on Mr. Enright's state of mind as to whether he would have requested a transfer back.

THE COURT: I would assume nobody wants to go back to segregation.

MS. HERMAN: All right. If your Honor is sufficiently aware of the conditions.

Q How long did you remain at Greenhaven after your arrival at the end of January?

A Approximately two weeks.

Q Where did you go from there?

A I was transferred to Attica.

Q How long did you remain at Attica?

A I remained there, I guess, approximately anothertwo weeks before I was brought down to the Southern District once again.

Q During the time that you were at Greenhaven and Attica, during January and February, did you have any contacts with your attorney, Mr. Lang?

A The only contact I can recall with Mr. Lang

is I received a letter. I think the letter was delayed because it was sent to Greenhaven and then sent to Attica with some 3500 material plus a letter saying he had a trial set for, I think it was, February 24th.

Q Was that the only subject discussed in the letter?

A Yes, it was.

Q Was there any mention of the telephone call made to the U.S. Attorney?

A No.

Q What ultimately happened on 74 Crim. 1152?

A I was convicted and sentenced.

Q Did you take an appeal?

A Yes, I did.

Q Who represented you on that appeal?

A I think the Federal Legal Aid or the Public Defender, whatever.

Q Did an attorney from the Federal Legal Aid confer with you about the possible grounds for appeal?

A Through the mails, yes.

Q Did you make any suggestion about grounds that could be raised on appeal?

A Possibly. I don't recall exactly what grounds.

Q Did there come a time when you became aware of the provisions of the interstate agreement on detainers?

A Yes, maybe, I guess, the Spring of 1975.

Q How did that come about?

A I saw a piece in the paper where a decision had come down, I think from the Eastern District, regarding being transferred from one district to another.

Q Are you referring to the decision in Mauro?

A Mauro, right.

Q Prior to this event, had you at any time been aware of your rights under the interstate agreement on detainers?

A No, I was not.

Q Did you ever request of anyone that you be returned to state custody prior to your federal trial of 74 Crim. 1152?

A No, I did not.

MS. HERMAN: No further questions.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MS. COTE:

Q Mr. Enright, did you rob a bank, the Chase Manhattan Bank on Mosholu Avenue in the Bronx, New York, on September 14, 1973?

THE COURT: That's really unimportant. He has been convicted.

Let's go on. What is this for?

MS. COTE: It may have some bearing on his credibility, your Honor, depending on what answers Mr. Enright gives.

THE COURT: Go ahead.

A Would you repeat the question, please?

Q Yes.

Did you rob the Chase Manhattan Bank on Mosholu Avenue on September 14, 1973?

A Yes, I did.

Q Did you rob the National Bank of Westchester in Mount Vernon, New York on July 18, 1973?

A Yes, I did.

Q You spent considerable time in Westchester County during 1974, didn't you?

A During 1974?

Q Prior to your arrest.

THE COURT: He was in jail, wasn't he?

A The question was did I spend --

Q Yes, let me ask this question first:

When were you arrested by state authorities?

A Easter Sunday, 1974.

Q Prior to that arrest on Easter Sunday, 1974, had you spent considerable time in Westchester County?

A I don't recall spending considerable time there, no.

Q Did you live in Westchester County during 1973 or 1974?

A No.

Q Did members of your family live in Westchester County during 1973 or 1974?

A No.

Q Did you rob any bank in Westchester County during 1973 or 1974?

THE COURT: He has already admitted, July 19, 1973.

MS. COTE: Yes.

Q Any other bank?

A During 1973 or 1974?

Q Yes.

A No.

Q You testified, Mr. Enright, that you were notified on December 2, 1974 that a federal warrant had been lodged against you for a bank robbery; is that correct?

A That was just a rough estimate of the date.

I wasn't sure.

Q You were also notified at that time that you had a right to a speedy trial, is that correct?

A Yes.

Q You knew that you had that right to a speedy trial on federal charges, even though you were then incarcerated in state custody, right?

A Yes.

Q After you were in New York City to stand trial for those federal charges, you contacted your lawyer, didn't you, and you asked to be returned to Greenhaven; correct?

A No, that's not correct.

Q You mean that you never had a conversation with your attorney, Gordon Lang, in New York City about getting a transfer back to Greenhaven?

A I can't imagine why I would want to.

Q Then you were completely surprised at the fact that you were transferred back to Greenhaven?

A I don't know if "surprise" is the right word. Maybe a little confused because I wasn't that familiar with federal procedures.

Q You had never been incarcerated in prison before being arrested in 1974?

A Would you repeat that, please?

Q You had never been imprisoned before being picked up Easter 1974?

A I had never been in federal authorities before.

Q But you had spent time in prison before that?

A Yes, I did.

Q Did you make any inquiry of your attorney as to why you were being returned to state custody?

A No, I did not.

Q You only asked Mr. Gonzales to explain why you were being returned to state custody?

A Yes.

Q But you didn't write a letter either to the Court or to your attorney protesting this transfer, is that correct?

A That's correct.

Q However, you had written the Court already concerning your case and requesting a speedy trial; isn't that correct?

A That's correct.

Q Were you worried at all that this transfer might delay your right to a speedy trial?

A My remembrance of that incident was that I

was just a little confused over why I was being returned.

Q But you were unable to get a clarification on your situation from Mr. Gonzales other than an explanation that you were being returned to Greenhaven; isn't that correct?

A Would you repeat that, please?

Q Other than just being told by Mr. Gonzales that you were, in fact, being returned to Greenhaven, you didn't get any further explanation of the transfer, isn't that correct?

A Well, actually I didn't get an explanation from Mr. Gonzales either. I just brought it to his attention and asked him to do something about it.

Q Although Mr. Gonzales was unable to help you, you didn't seek to clarify the situation with anyone else; isn't that correct?

A I guess I would say that's correct. I'd like to clarify it a little and say that the court list comes out 7:00 o'clock at night and you are transferred 9:00 o'clock the next morning.

Q Once you were back in Greenhaven, you did receive communication from your attorney, Mr. Lang; is that correct?

A I don't recall receiving any communication in

Greenhaven. I recall when I was transferred to Attica I received a letter from Mr. Lang.

Q Did you know Mr. Lang's address?

A I assume I did. Probably, sure.

Q Did you know who your federal case had been assigned to, which Judge your federal case had been assigned to?

A No, I have no idea.

Q By the way, Mr. Enright, it was Greenhaven from which you escaped in 1974; wasn't it?

A Yes.

Q Mr. Enright, how much more time do you have to serve for your violation of parole?

A Well, the maximum expiration, I believe, is November, 1979 on the sentence I am serving now.

Q How much more time do you have to serve for your escape to Greenhaven?

A That's the sentence I am speaking of.

Q Is there any other outstanding state charges against you?

A No.

Q So,in 1979, you will be released from state custody?

A Well, I would probably be released before

then, but that's the --

Q How much more time do you have to serve on the sentence you received in the Eastern District of New York?

A Well, it was a ten year sentence -- that was two years ago -- about eight years.

Q Do you at the present time have any claim pending against that conviction and sentence?

A No.

Q How much time did you receive from this court for the bank robbery for which you were convicted in 1975?

A Twenty years.

Q Isn't it true, then, that in eight years from now you will still have approximately eleven years to serve on the sentence for which you were convicted in this court?

A That's correct.

THE COURT: How do you figure that out? Wasn't the sentence in this court concurrent with the state sentence?

MS. COTE: Yes. I believe I said eleven years, your Honor.

A It would be ten, actually.

MS. COTE: Coming approximately eight years from now. Since he was sentenced in -- I am sorry, I should have said ten years instead of eleven.

THE COURT: Start again.

MS. COTE: I believe he said he had eight years still to serve on the conviction in the Eastern District of New York. Eight years from now, then, the only conviction for which he will be imprisoned is the one imposed by this court. That was a twenty year sentence imposed in 1975.

THE COURT: So he'd have ten years maximum.

MS. COTE: Correct, just as he has eight years maximum still to serve on the Eastern District conviction.

Q Mr. Enright, you indicated that you first learned about the Interstate Detainer Act, as I believe I am quoting you here, from reading about it in a paper.

A A newspaper, correct.

Q Could you please indicate to the Court what newspaper you are talking about?

A I believe it was The New York Post.

Q Would it be fair to say, Mr. Enright, that you have spent some time thinking about what legal claims you might have in order to challenge the sentence imposed

by this court?

A Could you repeat the first part of that?

Q Would it be fair to say that you have spent some time thinking about what legal claims you could have to challenge the sentence imposed by this court?

A No, I wouldn't say that was fair.

Q You indicated that you had made some recommendations, though you couldn't remember what the specifics were about the grounds you might have had for challenging the conviction imposed by this court; is that correct?

A I believe so, yes.

Q But other than that, you have not given any thought to how you could challenge this conviction?

A I hadn't given it any thought until Mauro.

Q From reading of Mauro and any other law in regards to this challenge to the conviction, it's made you aware, hadn't it, that it would hurt your claim if you would admit that you had requested a transfer back to Greenhaven?

A Certainly.

Q One final question: Where were you captured after your escape from Greenhaven?

A Do you mean the location?

Q Yes.

A Queens, New York.

MS. COTE: The government has no further questions, your Honor.

MS. HERMAN: No questions, your Honor.

THE COURT: You may step down, Mr. Enright.

(Witness excused)

I gather that's the petitioner's case --

MS. HERMAN: I think the government has already introduced a stipulation --

THE COURT: As to Mr. Lang, who is going to put it in?

Ms. Herman, why don't you put it in.

MS. HERMAN: All right, your Honor.

We don't have a stipulation written out, your Honor. I do have here the affidavit that Mr. Lang submitted previously.

THE COURT: I have read that.

MS. HERMAN: -- and on the stipulation of the United States Attorney I would offer the affidavit.

THE COURT: I gather the government is representing that if Mr. Lang were called he would merely repeat what is in the affidavit in support of the petition.

MS. COTE: Yes, your Honor.

THE COURT: All right. You may proceed.

MS. COTE: The government calls Jeffrey Glekel.

J E F F R E Y G L E K E L , called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. COTE:

Q Mr. Glekel, are you presently employed?

A I am presently on vacation. I begin a clerkship with Justice White in July.

Q What was your last job?

A I was an Assistant U.S. Attorney in this district until the end of March of this year.

Q During your tenure as an Assistant United States Attorney in this district, was the case in which Robert J. Enright was charged with bank robbery assigned to you?

A Yes, it was.

Q Did you procure an indictment against Mr. Enright?

A Yes, the grand jury voted an indictment, I believe it was, in December of 1974.

Q Prior to trial, did you take any action to

secure the presence of the defendant in this district?

A I arranged for the filing of a writ of habeas corpus ad prosequandum for Mr. Enright to be produced for his arraignment.

Q What was the term of that writ?

A The term was that he was to be produced and kept in this district until he was convicted, acquitted or otherwise discharged.

Q Do you know if the defendant was produced pursuant to that writ?

A Yes, he was.

Q Was the defendant represented by an attorney after his production in the federal court?

A Yes, he was.

Q Who was that attorney?

A Gordon Lang.

Q Do you know where Mr. Lang's offices were located?

A I believe they were in Manhattan. I don't recall the address.

Q Did there come a time when you had a conversation with Mr. Lang regarding Defendant Enright's place of confinement?

A Yes, there was.

Q Can you remember the date of that conversation?

A I don't recall the date. It was sometime in January of 1975.

Q Please describe that conversation as fully as you can.

A Well, Mr. Lang asked me whether --

THE COURT: Who called whom, do you remember?

THE WITNESS: Yes, I do.

MS. HERMAN: Your Honor, I object to this testimony on the ground that it is hearsay.

THE COURT: Overruled.

A Mr. Lang called me. We may have discussed matters other than Mr. Enright's place of confinement, but I don't recall those other matters. Sometime during the course of this conversation, I believe it was at the beginning, Mr. Lang asked me whether Mr. Enright would be returned to Greenhaven pending his trial of the federal charges.

Q What was your response to that?

A My response was that the normal procedure was that he remain in West Street until he was tried.

Q What did Mr. Lang say after he was informed of that?

A Mr. Lang then said that Mr. Enright desired to be transferred back to Greenhaven until trial.

I then asked Mr. Lang --

MS. HERMAN: Your Honor, I object to this testimony on the ground that it is now double hearsay.

COURT: It's all -- I have his affidavit. I have his testimony. This is the man on the other side.

Overruled.

MS. COTE: Your Honor, the government would suggest this is not hearsay at all in that it is an admission that the defendant conveyed through the agency of his attorney.

THE COURT: I will assume -- let's get his testimony in. There is a simple issue here.

Does the fact that this defendant did not tell his attorney, bind the government who was advised by his regularly retained counsel?

MS. HERMAN: Your Honor, I think the issue here is not whether the government was in good faith in ordering Mr. Enright's transfer, which I wouldn't question, but whether there was a personal waiver, a knowing and intelligent waiver on the part of Mr. Lang.

THE COURT: Supposing the government acts upon the representation by privately retained counsel.

MS. HERMAN: I think at that point, your Honor, the way to proceed has already been shown by the Second Circuit in the case of United States v. Ford, that the defendant should be produced in open court when the writ is being marked satisfied so that the Court will have an opportunity --

THE COURT: We will worry about that later. Let's get his testimony as to what he did.

MS. HERMAN: I have no objection to testimony as to what he did, but --

THE COURT: You must rely on what he is saying, what was told to him by privately retained counsel.

MS. HERMAN: But as to whether Mr. Lang's statement would be the --

THE COURT: We will worry about that later on . He is entitled to get it on the record.

MS. HERMAN: Subject to connection, I would agree.

Q Would you please continue relating the conversation you had with Mr. Lang?

THE COURT: What is the connection, Lang is going to say he doesn't remember anything.

MS. HERMAN: Whether there was an authorization.

THE COURT: I will assume Lang will say no. I will even go that far. That doesn't mean he didn't say to Mr. Glekel that "My client wants to be returned." That's why Lang is not here testifying, isn't it?

MS. HERMAN: Because he doesn't recall.

THE COURT: Because he doesn't recall anything.

BY MS. COTE:

Q Go ahead.

A I asked Mr. Lang whether he was conveying Enright's request that he be transferred.

Mr. Lang said yes, he was calling on Mr. Enright's request.

I also asked Mr. Lang what was the reason that Enright should be sent back to Greenhaven. I do not have a clear recollection of what reason he gave me. I do recall the reason satisfied me, and it may have been related to his desire to see someone or to be in a place where he could easily be visited by someone who resided much closer to Greenhaven than to New York. Beyond that, my recollection fails.

THE COURT: Pardon me. Let's get something on the record here.

Isn't it true that a State prisoner does not

get time against a sentence if he is in federal custody awaiting trial?

MS. HERMAN: No, your Honor. Under the New York Penal Law, Section 70, people do get full credit for jail time, Section 7030. People do get full credit for the time they spend in jail while awaiting trial.

THE COURT: Even if they are in another jurisdiction?

MS. HERMAN: All right.

MS. COTE: I am not sure, though, your Honor, that would cover segregation time. That would be mandated by the specific institution.

THE COURT: That may be a question for briefing.

MS. HERMAN: Jail time credit only says that the state time is still running against the state sentence. Where the person is serving that within the institution, of course, is not covered.

THE COURT: Let's go.

BY MS. COTE:

Q Let me show you, Mr. Glekel, what has been marked as Government's Exhibit 1 for identification.

Does that refresh your recollection as to the specific date on which you spoke with Mr. Lang?

A Yes, it does.

Q What is the document marked as Government's Exhibit 1 for identification?

THE COURT: Let's make it Exhibit A because you are a defendant.

(Defendant's Exhibit A marked for identification)

A After I spoke with Mr. Lang, I made a brief handwritten memorandum of the conversation which is Government's Exhibit A.

Q What was the date upon which you spoke?

A January 24, 1975.

MS. COTE: I am showing the original copy to plaintiff.

Your Honor, the government moves Government's Exhibit A for identification be put in evidence.

MS. HERMAN: I object, your Honor, on the grounds that this document does contain multiple hearsay under Rule 805 of the Federal Rules of Evidence.

THE COURT: I won't admit it. It was used to refresh his recollection.

MS. HERMAN: As used to refresh his recollection, your Honor, the document may not be admitted into evidence.

THE COURT: I said I would not admit it. It was used to refresh his recollection.

Q What did you do after making the memorandum of this phone call, Mr. Glekel?

A Well, I called the marshal's office and told some individual in that office that the writ might be satisfied and Enright returned to Greenhaven.

I am not sure whether I made the phone call first or wrote the memorandum first, but I did both within an hour or so within my conversation with Mr. Lang.

Q Do you know if, in fact, the defendant was removed from federal custody?

A He was removed.

Q Did you, again, attempt to obtain the defendant's presence for trial at a later date?

A Yes. Sometime, I don't think too long after that, I received a communication from Judge Metzner's chambers that a trial date be set.

I then arranged for the filing of a writ of habeas corpus prosequandum so that Enright might be returned to stand trial.

In fact, I arranged for the filing of two writs, the first one addressed to Greenhaven. After that, I found out that Enright had been transferred to Attica

and a second writ had to be filed addressed to Attica to arrange for his return to stand trial.

Q Were you the attorney for the government both at the trial of the defendant and on appeal following the defendant's conviction?

A Yes, I was.

Q Did the defendant or his attorney ever raise a claim prior to or during trial or during the appeal relating to the violation of the Interstate Detainer Act?

A No.

MS. COTE: No further questions, your Honor.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MS. HERMAN:

Q Mr. Glekel, you have testified that this conversation with Mr. Lang took place on January 24th, is that correct?

A I believe that was the date.

Q On that same date, did you request the Court to satisfy the writ of habeas corpus ad prosequandum that had --

A I didn't request the Court, I requested -- called the marshal's office and spoke to one of the deputies,

I don't recall which one, and how the procedure worked, at least at that time, was that from then on the marshals would take care of arranging for the satisfaction of the writ.

Q Did you ever ask that Mr. Enright be produced in court on connection with the satisfaction of the writ?

A No, I didn't.

Q Did you ever advise Judge Metzner that the writ was being satisfied?

A No.

Q Were you aware at that time that the case had been assigned to Judge Metzner for all purposes?

A Yes.

Q Did you ever speak to Mr. Enright personally before the trial regarding anything in connection with the transfer?

A Certainly not in connection with the transfer. I don't recall whether I ever attempted to interview Mr. Enright or not, but I never discussed the transfer with him.

Q Mr. Glekel, this conversation took place on January 24th, do you remember the exact words that Mr. Lang used during this conversation?

A No, I don't.

Q Does your memorandum that you made at the time reflect your understanding of what Mr. Lang said?

A It reflects my understanding of at least the main points of the conversation. It's not necessarily -- I don't think it's exhaustive of everything that was said.

Q Let me clarify this:

You have also testified that you don't remember any reason that Mr. Lang might have given for wanting Mr. Enright transferred back or for Mr. Enright wanting to be transferred back?

A I said I have a vague recollection that at least one reason he might have given was that there was --

Q Could you just testify as to what you recall was said?

A I am saying I do recall this, but very vaguely. That is that one of the reasons which Mr. Lang gave that there was someone close to Mr. Enright or wanted to visit Mr. Enright who either lived near Greenhaven or lived much nearer Greenhaven than lower Manhattan.

THE COURT: Where is Greenhaven located?

THE WITNESS: I don't recall what county it is, but it's a distance away from here.

MS. HERMAN: It's in Stormville, New York,

which is in Dutchess County near Poughkeepsie.

Q But you don't recall whether or not Mr. Lang in fact said something to that effect?

A Well, I believe that's one of the things he said, but I am not sure.

Q Did you make any recording of that reason or any other reason in your memorandum?

A No.

MS. HERMAN: No further questions.

THE COURT: Any redirect?

MS. COTE: Yes, your Honor.

The government moves to introduce Defendant's Exhibit A for identification into evidence.

THE COURT: On what basis?

MS. COTE: First of all, the basis is that since this is a pretrial or a non-trial hearing in which the Federal Rules of Evidence regarding hearsay would not apply; secondly, the government moves to admit this on the basis of the insinuation that Mr. Glekel is in some ways shaping his testimony during this hearing, and that the memo to the files which he executed on January 24th does not fully reflect the conversation that he had with the attorney.

THE COURT: Where is Mr. Glekel's answer?

MS. COTE: Your Honor, may I hand the Court a copy of an affidavit submitted by Mr. Glekel to which this memorandum or a xerox of it was attached as Exhibit A?

THE COURT: Let me see it.

(Handing)

THE COURT: When I decided this matter I returned Mr. Glekel's affidavit.

THE CLERK: Yes, your Honor.

THE COURT: You don't have it there?

THE CLERK: I am going through the papers now.

THE COURT: I might as well let it in because it's in the file now.

MS. HERMAN: Your Honor, as part of the file it is not evidence in this case.

THE COURT: It's an affidavit submitted in conjunction with this proceeding. I have read it. What I am going to do, say I didn't read it? I don't know what it adds, but put it in.

(Defendant's Exhibit A received in evidence)

MS. COTE: The government rests, your Honor.

THE COURT: You may step down.

(Witness excused)

THE COURT: It seems to me the only issue here is whether the motion has to be granted despite the government having been misled by privately retained counsel and taken an action which ordinarily would not have taken.

MS. HERMAN: We will be happy to submit a post-hearing memorandum on that case. I think it is clear from the decision in Mauro that the waiver is judged by the Johnson Reserve standards and must be a personal, knowing and intelligent waiver.

THE COURT: I will take briefs from both sides. I will give you ten days. Today is the 13th. The 23rd. Each side submit a brief on the finding that the government took its action on the representations made to it by privately retained counsel, an action which the government would not have taken but for the representation of privately retained counsel.

MS. COTE: Your Honor, the government has two applications.

THE COURT: Yes.

MS. COTE: The first is a clarification of whether the one finding you have made so far in this case that the government took the action on the representations

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of privately retained counsel would have been a finding even if the burden of proof was on the government in this hearing.

THE COURT: No matter who has the burden of proof I will take it.

MS. COTE: Thank you.

The second is finding with respect to the credibility of Mr. Enright as to whether or not Mr. Enright had made the request of his counsel to contact the Assistant United States Attorney on the case.

THE COURT: I will not go that far. Mr. Lang is not here. Mr. Lang doesn't recall his conversation with Mr. Glekel, and he doesn't recall whether his client told him that. He merely gives me argument as to why the client would not have done it.

I think this case has to be determined on the fact that the government was apprised by privately retained counsel that his client, Mr. Enright, wanted to return to Greenhaven; that the government relied on that representation and returned Mr. Enright to Greenhaven by directing that the writ be marked satisfied and changed its position and puts itself in the possibility -- the question is going to be brief -- that such action adds up to a violation of the interstate agreement. It's as simple

as all that.

Did you mark the writ satisfied?

MS. HERMAN: Yes, your Honor. We have Mr. Enright here in open court and I hereby state th I believe the purpose of his visit to the Southern District has been fulfilled, and I would request that the writ be satisfied and Mr. Enright concurs.

THE COURT: Mr. Enright, you concur in the application of your counsel that the writ be satisfied and you can return to Attica?

THE PLAINTIFF: Yes, your Honor.

THE COURT: Let me have the writ.

(Time noted: 12:30 p.m.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

ROBERT J. ENRIGHT, :

Petitioner, :

-against- : 77 Civ. 449
(74 Cr. 1152)
UNITED STATES OF AMERICA, : CMM

Respondent. :

- x

A P P E A R A N C E S

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Denise Cote, Assistant United States Attorney
Of Counsel

METZNER, D. J.:

This is an application for a writ of habeas corpus by a federal prisoner pursuant to 28 U.S.C. § 2255. Petitioner alleges that his twenty-year sentence of imprisonment imposed by this court in 74 Cr. 1152 is unlawful in that he was tried on that indictment in violation of Article IV(e) of the Interstate Agreement on Detainers (the Act), 18 U.S.C. App.

On May 24, 1977, this court issued an opinion which reviewed the facts of this case and concluded that an evidentiary hearing on the issue of whether petitioner had waived his rights under the Act was necessary. That hearing was held on June 10, 1977.

Petitioner testified without contradiction at the hearing that he had never requested to be returned to state custody prior to his trial on his federal indictment, and that he never authorized his attorney to request such a transfer for him. He further testified that he was never informed of his rights under the Act and first became aware of those rights only after reading a newspaper article regarding the decision of United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), petition for cert. filed, 45 U.S.L.W. 3765 (U.S. May 13, 1977) (No. 76-1596).

Petitioner was returned to state custody as a result of a telephone request for such a transfer from

petitioner's privately retained attorney. The government was prepared to proceed to trial whenever the court's docket permitted. However, petitioner's attorney at his criminal trial stated that the petitioner himself desired such a transfer. Solely as a result of the telephone call, the assistant proceeded immediately that day to have the writ of habeas corpus ad prosequendum satisfied by the Part I judge. He was not the judge to whom this case was assigned.

The issue, therefore, is whether these facts indicate a waiver by petitioner of his rights under the Act.

The Second Circuit has explicitly stated that for there to be an effective waiver of rights under the Act, it must be shown that there was an "'intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464 . . . (1938)." United States v. Mauro, supra at 591 n.3.

The first requirement for a waiver to be valid under this standard is that the waiver must be that of the person alleged to have waived a right. In Humphrey v. Cady, 405 U.S. 504 (1972), the Supreme Court was presented with the issue of whether an attorney had validly waived a client's right. The Court, in remanding

to the district court for an evidentiary hearing, stated "a waiver must be the product of an understanding and knowing decision by the petitioner himself, who is not necessarily bound by the decision or default of his counsel." Id. at 517. The Court further stated: "If the District Court cannot find persuasive evidence of a knowing and intelligent waiver on the part of the petitioner himself, then the Court should proceed to consider petitioner's constitutional claims." Id. The evidence in this case fails to prove that petitioner himself waived his rights under the Act.

Since this court finds that petitioner did not waive his right to have a trial on his federal indictment prior to his return to state custody, the court must grant this petition for a writ of habeas corpus. The Second Circuit's decisions in United States v. Cyphers and Ferro, No. 76-1131, 76-1160 (2d Cir., February 8, 1977), United States v. Ford, 550 F.2d 732 (2d Cir. 1977), and United States v. Mauro, supra, compel such a result, despite the government's desire for a speedy trial and the actual scheduling of such a trial by the court three days after the writ was satisfied. The court was unaware at the time of what had transpired prior thereto.

The government argues, inter alia, that failure of petitioner to raise this issue either at trial or on

appeal should thus preclude him from seeking collateral relief. This issue has not been passed upon by the Second Circuit. United States v. Chico and Colello, No. 77-1016, slip op. at 4280 n.5 (2d Cir. June 20, 1977).

It is the opinion of this court that a prisoner may seek relief pursuant to 28 U.S.C. § 2255 for a sentence imposed allegedly in violation of the Act. Although "non-constitutional claims that could have been raised on appeal, but were not, may not be asserted in collateral proceedings," Stone v. Powell, 428 U.S. 465, 477 n. 10 (1976), where the alleged violation is constitutional in nature or goes to a jurisdictional defect, a collateral attack is always permitted. E.g., United States v. Loschiavo, 531 F.2d 659, 662-63 (2d Cir. 1976). Article IV(e) of the Act states:

> "If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice." 18 U.S.C. App. (emphasis supplied).

Thus it is clear that if a prisoner is returned to state custody prior to a trial on his federal indictment, that federal indictment loses all "force or effect" upon the transfer of the prisoner back to the state. Therefore, this court was without jurisdiction to either determine the merits of the case or to impose sentence in regard

to indictment 74 Cr. 1152. Since the violation of Article IV(e) of the Act created a jurisdictional defect in the indictment, the sentence imposed upon it may be attacked collaterally in a Section 2255 petition, even though not raised at trial or on appeal.

Accordingly, this petition is granted. A writ shall issue, but the issuance of the writ shall be stayed for thirty days pending the filing of a notice of appeal by the government, if it is so advised.

So ordered.

Dated: New York, N. Y.
July 13, 1977

Charles H. Tenney
U. S. D. J.

A 178

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

ROBERT J. ENRIGHT, :

Petitioner, :

- v - : MOTION FOR REARGUMENT

UNITED STATES OF AMERICA, : 77 Civ. 449 (CMM)

Respondent. :

- -x

PLEASE TAKE NOTICE THAT upon the annexed affidavit of Assistant United States Attorney Denise Cote and the accompanying Memorandum, the Government will move this Court, on July 25, 1977 at 10:00 A.M. in the forenoon at Room 2201 in the United States Courthouse, Foley Square, New York, New York, for reargument of the Order of this Court of July 13, 1977 granting a motion made pursuant to Title 28, United States Code, Section 2255 and for clarification of the terms of the Order of July 13, 1977 by which the issuance of the writ was stayed.

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York

By: _____
DENISE COTE
Assistant United States Attorney
Office & Post Office Address:
One St. Andrew's Plaza
New York, New York 10007
Tel.: (212) 791-0065

3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

ROBERT J. ENRIGHT, :

Petitioner, :

- v - : AFFIDAVIT

UNITED STATES OF AMERICA, : 77 Civ. 449 (CMM)

Respondent. :

- -x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.
SOUTHERN DISTRICT OF NEW YORK)

DENISE COTE, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York. I make this affidavit in support of the motion of the United States for reargument of the Order of this Court of July 13, 1977, granting a motion made pursuant to Title 28, United States Code, Section 2255.

2. On July 13, 1977, the Court ordered the writ to issue on behalf of petitioner. The order followed submission of briefs by both the petitioner and the United States and a hearing on June 10, 1977 at which the Government and the petitioner presented evidence. The issue of the retroactivity of United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), which decision was the basis for granting relief to the petitioner, was not addressed in the papers submitted by either party or at the hearing.

DC:ow
07-3153

3. For the reasons stated in the accompanying memorandum, it is the Government's position that Mauro should not be applied retroactively.

4. It is the firm intention of the United States Attorney to appeal this order, in the event that the present motion is denied, to the United States Court of Appeals for the Second Circuit. The Government thus requests that the issuance of the writ be stayed until the motion for reargument is decided. If the Court denies our motion, the Government will request that the issuance of the writ be stayed for thirty days from such denial in accordance with the terms of the Order of July 13, 1977, see United States v. Dieter, 97 S. Ct. 18 (Oct. 12, 1976), with the clarification that a filing of a notice of appeal by the Government within the thirty days following such denial will stay the issuance of a writ until a decision is rendered by the Court of Appeals for the Second Circuit, thus obviating the possible need for a further motion for a stay to the Court of Appeals.

WHEREFORE, the Government respectfully requests that this Court grant the motion for reargument and for clarification of the terms of the Order of July 13, 1977, and for such other and further relief as may seem to the Court just and proper.

DENISE COTE
Assistant United States Attorney

Sworn to before me this
day of July, 1977.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT J. ENRIGHT,	:	
Petitioner,	:	
-v-	:	77 Civ. 449 (CMM)
UNITED STATES OF AMERICA,	:	
Respondent.	:	

GOVERNMENT'S MEMORANDUM IN SUPPORT OF REARGUMENT

On July 13, 1977, the Court ordered that a writ of habeas corpus issue on behalf of the petitioner. The Government moves for reargument of the Order on the grounds that United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), should not be applied retroactively to transfers that antedated the decision.

In Mauro, the Second Circuit ruled for the first time in any Court of Appeal that the Interstate Agreement on Detainers (the "Agreement") limited the Government's

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ability to procure state prisoners under a writ of habeas corpus ad prosequendum. Subsequently, in two decisions in which the Government's briefs were filed before the filing of the Mauro decision, the Court of Appeals has reaffirmed its holding in Mauro. United States v. Cyphers, Dkt. No. 76-1131, slip op. 1737 (2d Cir., Feb. 8, 1977); United States v. Ford, 550 F.2d 732 (2d Cir. 1977). The Court of Appeals has not, however, addressed the fundamental issue of whether the Court's novel interpretation of the Agreement should be applied to transfers that antedated Mauro and that occurred at a time when literally no one ever considered that writs of habeas corpus ad prosequendum were somehow limited by the Agreement.

In numerous decisions concerning the possible retroactivity of its decisions, the Supreme Court has routinely granted full retroactive effect only in two situations: where the decision relates to an "aspect of the criminal trial that substantially impairs its truthfinding function," United States v. Peltier, 422 U.S. 531, 535 (1975)*, and where the conduct that is the subject of

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* See, e.g., Ivan V. v. New York, 407 U.S. 203, 204 (1972); McConnell v. Rhay, 393 U.S. 2 (1968); Pickelsimer v. Wainwright, 375 U.S. 2 (1963).

the indictment was found under the prior decision to be "constitutionally immune from punishment."* Enright's claim is inapplicable to either situation. In other situations, the Supreme Court has adopted a three-prong test based upon 1) the purpose to be served by the new decision, 2) the extent of reliance upon the previous law by the Government, and 3) "the effect on the administration of justice of a retroactive application of the new decision." Halliday v. United States, 394 U.S. 831, 832 (1969); Desist v. United States, 394 U.S. 244, 249 (1969); Stovall v. Denno, 388 U.S. 293, 297 (1967).** Each of these factors clearly demonstrates that Mauro should not be applied retroactively.

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* See, e.g., Robinson v. Neil, 409 U.S. 505, 509 (1973); United States v. U.S. Coin & Currency, 401 U.S. 715, 723-24 (1971).

** This Court has also retroactively applied decisions that merely "clarify or extend" prior law. Gates v. Henderson, ___ F.2d ____ n. 2 (2d Cir. 1977), suggestion for rehearing en banc granted; Welcome v. Vincent, 549 F.2d 853, 858 n. 3 (2d Cir. 1977); see also Ferguson v. United States, 513 F.2d 1011, 1012 (2d Cir. 1975) (Kaufman, C.J.). As the Mauro panel acknowledged, 544 F.2d at 589 its decision was wholly unprecedented, and thus these decisions are inapplicable. Indeed in Ferguson the Court noted that prospective application was appropriate for new decisions "which conflicted with well-established prior practice." Id.

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Turning first to the purpose to be served by the prior decision, the purposes of the Agreement are set forth in Article I: "to encourage the expeditious and orderly disposition" of charges outstanding against a prisoner, and to eliminate "uncertainties which obstruct programs of prisoner treatment and rehabilitation." Neither of these objectives bears any relation to the truth-determining function of a trial, nor does it designate a sphere of activity constitutionally immune from punishment. Hence, the only justifications recognized by the Supreme Court for applying its decisions retroactively are absent. Moreover, neither of the stated purposes of the Agreement could be significantly furthered by its retroactive application here. There is nothing in the record to suggest that Enright's program of rehabilitation has been impaired by his two trips to the Southern District of New York. Quite the contrary, from the evidence produced by Enright at the hearing it appears that he was in solitary confinement prior to and following his production in the Southern District. Further, as the Court found after the hearing, the Government was prepared to

proceed to trial whenever the court's docket permitted and there is no evidence that the return to state custody following the request of defense counsel resulted in any delay of the trial. Even putting aside the specifics of Enright's situation, we submit that it is inconceivable that "the expeditious and orderly disposition" of criminal cases would be furthered by retroactive application of Mauro. Prior to Mauro, a defendant's interest in prompt adjudication was more than adequately protected by the strictures of the Sixth Amendment, the various local speedy trial plans, and, more recently, by the Speedy Trial Act of 1974, 18 U.S.C. § 3161 et seq. In this regard, the Supreme Court has noted that in determining retroactive application of its decisions, it will consider whether "other safeguards are available" to protect the right asserted. Johnson v. New Jersey, 384 U.S. 719, 729 (1966). As noted, other safeguards are plainly available here.

The most important factor militating against retroactive application of Mauro is the reliance of law enforcement authorities on prior law. The Government argued to the Court of Appeals in Mauro that a writ of habeas corpus ad prosequendum, issued pursuant to 28 U.S.C. § 2241 (c) (5), was not a "detainer" within the meaning of the Agreement, and that when a prisoner's presence was obtained through a writ rather than through the elaborate mechanisms of the agreement, the Government was bound by one of the Agreement's restrictions. This was not merely a position that the Government advanced as an advocate: the argument accurately reflected the prior practice not only of the Government, but of all the state jurisdictions with which it had to deal in obtaining prisoners from state custody. Although the Court rejected the Government's arguments, with Judge Mansfield dissenting, it acknowledged that the decision was "one of first impression in this Court." 544 F.2d at 589. Indeed, the Fifth Circuit has recently declined to follow Mauro and has held that a writ of habeas corpus ad prosequendum is not a detainer within the meaning of the

Agreement, United States v. Scallion, 548 F.2d 1168 (5th Cir. 1977).* This difference of opinion indicates that the Mauro decision was not intuitively obvious,[4] and strongly suggests that prior reliance on the assumption that a writ was not a detainer was by no means irrational.** Indeed, it is significant that the defendant no less than the Government and the State of New York appeared to assume that the Agreement was inapplicable to these proceedings. Enright was brought to the Southern District of New York two times, on December 30, 1974 and on February 20, 1975, and yet he did not move to dismiss this indictment until 1977. Furthermore, neither he nor his counsel ever raised any objection to his return to state custody based on the Agreement. No clearer case for a reliance on prior law could be made.

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* Several judges in the Southern District of New York, had also rejected the reasoning of the district court opinion in Mauro prior to this Court's decision. See United States v. Brown ___ F. Supp. _____, (S.D.N.Y. 1976) (Metzner, J.); United States v. Lee, _____ F. Supp. _____, (S.D.N.Y. 1976) (Goettel, J.). No judge in the Southern District had agreed with Judge Bartel's decision prior to its affirmance. In the Third Circuit, the issue has been referred to the entire Court en banc. United States v. Sorrell, Dkt. No. 76-1647 (argued May 2, 1977).

** The Supreme Court has noted that retroactive application is inappropriate "if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law...." United States v. Peltier, supra, 422 U.S. at 538.

Third, the effect of a retroactive application of Mauro on the administration of justice is equally clear and equally devastating. Prior to the Mauro decision, prisoners were transferred on a regular basis from state to federal custody and back without regard for the provisions of the Agreement. It is highly likely, therefore, that there are significant numbers of convicted federal prisoners whose transfers from state to federal custody violated the Agreement. As word of the Mauro decision spreads, many, like Enright will raise a claim under the Agreement concerning transfers that occurred months or years before anyone had any inkling that the literally centuries-old, see Ex Parte Bollman, 8 U.S. (4 Cranch) 75 (1807) (Marshall, C.J.); Carbo v. United States, 364 U.S. 611 (1961), power of the Federal Government to procure prisoners on a writ was somehow limited in the way announced in Mauro. The adjudication of these claims, brought by individuals whose guilt of the crimes charged is no longer subject to question, is definitely contrary to any view of the interests of justice.

Finally, Enright cannot argue that the Supreme Court's retroactivity analysis does not apply because the Mauro decision merely interpreted a statute. First, this Court's decision in Mauro did not merely interpret the Agreement, but created a prophylactic rule to implement it. If the Agreement had stated, explicitly or with any reasonable clarity, that writs of habeas corpus ad prosequendum were henceforth governed by the intricate provisions of the Agreement, neither the Government nor any other party would have to wait for a court to interpret the Agreement before following it, since the law would be "circulated throughout the legal community and judges and attorneys [would] become aware that from a certain date in the future they will have to modify their practices." Korenfeld v. United States, 451 F2d 770, 774 (2d Cir. 1971), cert. denied, 406 U.S. 975 (1972) (applying Bye v. United States, 435 F.2d 177 (2d Cir. 1970) prospectively only). One can search in vain, however, for any such statement in the Agreement, or even a concrete representation of legislative intent; the Court of Appeals observation that the Government is a "party" to the Agreement simply does not resolve the issue of the Agreement's effect

on the Government's independent power -- not available to the states -- of using writs. Rather, the Second Circuit's conclusion that writs were now limited by the Agreement was based solely upon its reasoning that "[a]ny other construction would permit the United States to evade and circumvent the Agreement," 544 F.2d at 592. This determination is a prophylactic one of precisely the sort to which the retroactivity anaylsis most directly applies, Michigan v. Payne, 412 U.S. 47, 53 (1973).*

Second, the courts that have considered the issue have concluded that the Supreme Court's retroactivity analysis applies to an unforeseen interpretation of a statute, and indeed the Supreme Court has so ruled. This was made explicit by the Court of Appeals unanimous, en banc decision in United States v. Kaylor, 491 F.2d 1133, 1138-39 (2d Cir.) (en banc), vacated and remanded on other grounds,

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* Furthermore, the Court's purpose of enforcing compliance with the Agreement's purposes would be more than adequately served by prospective application; indeed, we represent to the Court that since the new interpretation of the Agreement became known, all transfers of prisoners have been conducted in accordance with the Agreement. In addition, it should be noted that the Government never attempted to "evade and circumvent" the Agreement in any intentional sense. It was simply our understanding between 1970 and 1976 that the Agreement did not apply to federal writs -- an understanding in which we have been joined by Judge Mansfield, the Fifth Circuit, and numerous District judges.

418 U.S. 909 (1974), applying its interpretation of the Youth Corrections Act prospectively only, and specifically employing the Desist and Stovall tests. Similarly, in Bailey v. Holley, 530 F.2d 169 172-74 (7th Cir. 1976), the Court specifically rejected "petitioner's contention that Stovall criteria for deciding questions of retroactivity are not applicable to decisi .s based on statutory construction." Id. at 173. See also Mower v. Britton, 504 F.2d 396, 399 (10th Cir. 1974). Other circuits have ruled similarly. See, e.g., Owens v. United States, 383 F. Supp. 780, 785-87 (M.D. Pa. 1974), aff'd, 515 F.2d 507 (3d Cir.), cert. denied, 423 U.S. 996 (1975); Jackson v. United States, 510 F.2d 1335 (10th Cir. 1975); Krilich v. United States, 502 F.2d 680, 683 (7th Cir. 1974), cert. denied, 420 U.S. 992 (1975). Indeed, the Supreme Court itself has afforded prospective applicability to its prior interpretation of written law. In McCarthy v. United States, 394 U.S. 459 (1969), the Court held that in the absence of strict compliance with Rule 11 of the Federal Rules of Criminal Procedure a guilty plea must be vacated. Although as a concurring justice noted, the decision "merely interpreted Rule 11 . . . and held that the rule must be strictly

applied according to its terms," Halliday v. United States, 394 U.S. 831, 834 (1969) (Harlan, J., concurring), the Court held that it would be applied prospectively only, Halliday v. United States, supra, 394 U.S. at 832-33, explicitly following the three-pronged test of Desist and Stovall.

In sum, the prophylactic purposes of the Second Circuit's ruling in Mauro are amply served by the present strict adherence to the provisions of the Agreement now practiced by the United States Attorneys in this Circuit. While the costs of prospective application are minimal--particularly, since, as noted, the purposes of the Agreement are already served by other laws - the costs of retrospective application are immense: unquestionably guilty men such as Enright will be freed only because of the Government's reliance on practices that no one (including, apparently, Enright) thought irregular.

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CONCLUSION

The motion for reargument of this Court's order of July 13, 1977, should be granted.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

DENISE COTE
FREDERICK T. DAVIS
Assistant United States Attorneys

- Of Counsel -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT J. ENRIGHT, Petitioner, -v.- UNITED STATES OF AMERICA, Respondent.	AFFIDAVIT IN OPPOSITION TO MOTION FOR REARGUMENT 77 Civ. 449 (CMM)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

SUSAN N. HERMAN, being duly sworn, deposes and says:

1. I am attorney for petitioner in the above-styled proceeding, and make this affidavit in opposition to the Government's motion for reargument of the Order of this Court of July 13, 1977, granting petitioner's motion pursuant to Title 28, United States Code, Section 2255.

2. By letter dated March 18, 1977, a copy of which is attached hereto as Exhibit A, the Government urged this Court to find that petitioner's motion to vacate sentence should be denied on the ground that the decision in United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), petition for cert. filed, 45 U.S.L.W. 3765 (U.S. May 13, 1977) (No. 76-1596), should not be applied retroactively.

3. In response to the Government's contentions, petitioner's letter dated March 30, 1977, a copy of which is attached hereto as Exhibit B, submitted that the retroactivity of Mauro, supra, is not at issue herein because the Government lodged a detainer against petitioner in the instant case, rather than proceeding solely by writ of habeas corpus ad prosequendum.

4. Petitioner respectfully submits that the Second Circuit's decisions in United States v. Cyphers & Ferro, No. 76-1131, 76-1160 (2d Cir., February 8, 1977) and United States v. Ford, 550 F.2d 732 (2d Cir. 1977) demonstrate that a ruling on the retroactivity of Mauro, supra, is not necessary where the Government proceeded by actual detainer.

5. Petitioner respectfully refers the Court to the argument, more fully set forth in Exhibit B hereto, that a decision on the retroactivity of Mauro, supra, is unnecessary in the instant case.

WHEREFORE, petitioner respectfully requests that this Court deny the Government's motion for reargument of the Order of July 13, 1977.

/s/
SUSAN N. HERMAN
Attorney for Petitioner

Sworn to before me this
day of July, 1977

/s/
Notary Public

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RECEIVED
MAR 23 1977
P. L. S. OF NEW YORK

March 18, 1977

The Honorable Charles M. Metzner
United States District Judge
Room 2201
United States Courthouse
Foley Square
New York, New York 10007

Re: Enright v. United States
77 Civ. 449

Dear Judge Metzner:

The Government recently filed in the Court of Appeals a petition for rehearing and rehearing en banc in the case of United States v. Ford, Dkt. No. 76-1319, slip op. 1681 (2d Cir., February 3, 1977). The petition is currently pending. In Point II of this petition, a copy of which I enclose, the Government took the position that the Court of Appeals decision in United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), which held for the first time that the United States is a "receiving State" within the meaning of the Interstate Agreement on Detainers ("Agreement") and that a writ of "habeas corpus ad prosequendum was the equivalent of a "request" by the prosecuting authority under the Agreement, should not be applied retroactively.

The Government respectfully directs the Court's attention to the Ford petition and urges the position set forth therein that Mauro should not be applied to transfers like Enright's that antedated it. In addition, of course,

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The Honorable Charles M. Metzner March 18, 1977

the Government contends, as set forth in its memorandum of law, that Enright's claim is not cognizable under § 2255 and has, in any event, been waived through procedural defaults.

Respectfully yours,

ROBERT B. FISKE, JR.
United States Attorney

By: _____
JEFFREY I. GLEKEL
Assistant United States Attorney
Telephone: 791-1147

Enclosure

cc: Ms. Susan N. Herman
Prisoners' Legal Services of New York
100 Church Street
New York, New York 10007

March 30, 1977

The Honorable Charles M. Metzner
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: Enright v. United States, 77 Civ. 449

Dear Judge Metzner:

In response to the Government's letter of March 18, petitioner has no objection if the Court wishes to await the Second Circuit's decision on the petition for rehearing and rehearing en banc pending in United States v. Ford, Dkt. No. 76-1319, slip op. 1681 (2d Cir., February 3, 1977).

Petitioner does wish to draw the Court's attention to the fact that a decision on the retroactivity of United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), is not a necessary component of a ruling on this motion to vacate sentence. In Mauro, the Court of Appeals held that the Interstate Agreement on Detainers ["the Agreement"] is the exclusive means by which the United States may obtain custody of a state prisoner, and that the Government, therefore, is bound by the provisions of the Agreement even when it acquires custody exclusively by issuance of a writ of habeas corpus ad prosequendum. In the instant case, as in Ford, the Government did not proceed solely by writ -- the writs of habeas corpus in each of these cases were issued after an actual detainer had been lodged with the state prison. Petitioner respectfully urges the position set forth in the moving papers herein, that regardless of the decision in Mauro, the Government was bound to follow the Agreement when it proceeded by detainer. This was the position taken by the Court of Appeals in Ford -- the Court specifically stated that it was not necessary to decide whether the writ issued therein constituted a detainer, under the rationale of Mauro, because an actual detainer had been lodged. United States v. Ford, supra at 1685-86.

The Mauro decision, in the context of the instant motion, merely presents a second and alternative ground for arriving at the same result: the Government was bound by the Agreement, first, because it proceeded by lodging a detainer, and

The Honorable Charles M. Metzner
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

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also, under the theory of Mauro, because the writs of habeas corpus ad prosequendum issued themselves constitute detainers within the meaning of the Agreement. If the Court wishes to consider the latter alternative, I would be glad to submit a memorandum on the question of whether Mauro should be applied retroactively.

Petitioner also respectfully submits that no question of retroactivity is posed by the Court of Appeals' assertion in Mauro that the United States is a "receiving state" within the meaning of the Agreement. This statutory interpretaion was not a novel ruling of law, but merely a rejection of the Government's ex post facto attempt to limit its participation by rewriting the Agreement. As the Mauro Court pointed out, the definition of "State" in Article II(a) of the Agreement expressly includes the United States; "[t]he statute places the United States on the same footing as any State which is a signatory to the compact;" "[t]here is admittedly nothing at all in the Agreement to support the distinction proffered by the Government [attempting to limit participation of the United States as a sending state only];" and, "the Agreement in clear and unequivocal language commits the United States to all of its terms including Article IV." Id. at 593-94. Mauro simply recognized Congress' clear intent that the United States be bound by the Agreement as a receiving as well as a sending state from the date of enactment of the Agreement in 1970.

Petitioner therefore urges that his claim under Article IV(e) of the Agreement does not necessitate any ruling on retroactivity, and that the only issues this Court need decide are the procedural and waiver questions already discussed in petitioner's memorandum in reply.

Respectfully yours,

SUSAN N. HERMAN
Attorney for Petitioner
Prisoners' Legal Services of New York
100 Church Street - 18th floor
New York, New York 10007
(212) 285-0386

SNH/kls

The Honorable Charles M. Metzner
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

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cc: Hon. Robert B. Fiske, Jr.
United States Attorney for
the Southern District of New York
1 St. Andrews Plaza
New York, New York 10007

Att: Jeffrey I. Glekel, Esq.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

ROBERT J. ENRIGHT :

-v- : NOTICE OF MOTION TO EXTEND STAY

UNITED STATES OF AMERICA, :

77 Civ. 449 (CMM)

Defendant. :

- -x

PLEASE TAKE NOTICE THAT upon the annexed affidavit of Assistant United States Attorney Denise Cote, the United States of America will move for an extension of the stay of the Order of the Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, entered on July 13, 1977, granting the motion by Robert J. Enright pursuant to Title 28, United States Code, Section 2255.

Dated: New York, New York
August 12, 1977

ROBERT B. FISKE, JR.
United States Attorney

By: Denise Cote
DENISE COTE
Assistant United States Attorney

To: Susan Herman, Esq.
Prisoners' Legal Services of
New York
100 Church Street
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

ROBERT J. ENRIGHT :

-v- : AFFIDAVIT

UNITED STATES OF AMERICA : 77 Civ. 449 (CMM)

Defendant :

- -x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

DENISE COTE, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the Office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York. I make this affidavit in support of the motion of the United States for a forty-five day extension of the stay of the Order of the Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, vacating the judgment of conviction of Robert J. Enright.

2. On July 13, 1977, Judge Metzner issued an order granting Enright's motion pursuant to Title 28, United States Code, Section 2255 on the ground that Enright's rights under the Interstate Agreement on Detainers Act had been violated. The order was stayed, however, for thirty days pending the filing of a notice of appeal by the Government.

3. On July 21, 1977, the Government filed a motion for reargument and for clarification of the terms of the Order of July 13, 1977. The Government's motion raised a retroactivity issue which had not been addressed in the Order of July 13, 1977. Susan M. Herman, Enright's counsel, has filed an affidavit in opposition to the motion for re-argument and on August 2, 1977 the Government sent a letter to Judge Metzner, with a copy to Ms. Herman, in response to the Herman affidavit.

4. Since the thirty day stay, issued by Judge Metzner will terminate on August 12, 1977, the Government must file a notice of appeal or get an extension of the stay before August 12.

5. Judge Metzner's law clerk, Mr. Joseph Loonan, indicated to me on August 10, 1977, that Judge Metzner is now on vacation and will continue to be unavailable until the second week of September. Mr. Loonan suggested that the Government apply to Part I for an extension of the stay in order to give Judge Metzner an opportunity to rule on the retroactivity issue which was the subject of the motion for reargument, a ruling which Judge Metzner desires to make. He also stated that the Government could represent to the Part I Judge that Judge Metzner would have granted the stay if he were available and that Mr. Loonan would confirm this understanding if requested to do so.

WHEREFORE, the Government respectfully requests that this Court extend for a period of forty-five days the stay issued by Judge Metzner in his Order of July 13, 1977 granting the motion by Robert J. Enright pursuant to Section 2255.

Denise Cote

DENISE COTE
Assistant United States Attorney

Sworn to before me this
12th day of August, 1977.

(2L) d Miss Cote (X5

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U.S. DISTRICT COURT
FILED
AUG 15 1977
S. D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT J. ENRIGHT

-v- : ORDER

UNITED STATES OF AMERICA : 77 Civ. 449 (CHM)

Defendant : 74-1152

Upon the application of the United States of America and the affidavit of Denise Cote, Assistant United States Attorney, it has been found that on July 13, 1977 the Honorable Charles M. Metzner issued a stay for thirty days of his Order of that same day granting the motion of Robert J. Enright pursuant to Title 28, United States Code, Section 2255. It is further found that the Government has made a motion for reargument and that Judge Metzner has not yet ruled on the motion for reargument. Judge Metzner being presently unavailable, the Government has requested an extension of the stay in order to give Judge Metzner time to respond to the motion for reargument. Accordingly it is

ORDERED that the stay of the Order of July 13, 1977, be and hereby is extended for forty-five days until September 26, 1977.

Dated: New York, New York
August 12, 1977

SO ORDERED:

United States District Judge

MICROFILMED
AUG 15 1977

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United States Department of Justice

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF NEW YORK
ONE ST. ANDREW'S PLAZA
NEW YORK, NEW YORK 10007

August 1977

ADDRESS REPLY TO
"UNITED STATES ATTORNEY"
AND REFER TO
INITIALS AND NUMBER
DC:mr

Honorable Charles M. Metzner
United States District Judge
Southern District of New York
Foley Square
New York, N. Y. 10007

Re: Enright v. United States, 77 Civ. 449 (CMM)

Dear Judge Metzner:

I am writing very briefly to respond to certain statements made in the affidavit of Susan N. Herman, filed by the movant Enright in this matter.

First, the Government was, of course, aware of the prior correspondence in this matter concerning the retroactive application of Mauro. Our concern, and our purpose in filing the motion for reargument, was to ensure that a complete record of the matter had been made in the District Court, since Your Honor's memorandum opinion in this matter did not discuss the retroactivity point.

Second, Ms. Herman's affidavit seems to assert that the Second Circuit's decisions in United States v. Cyphers & Ferro, Dkt. No. 76-1131, slip op. 1737 (2d Cir., Feb. 28, 1977) and in United States v. Ford, 550 F.2d 732 (2d Cir.), cert. applied for, 46 U.S.L.W. 3013 (July 7, 1977), bear on the issue of retroactivity. The Government's briefs in those cases were filed before the Second Circuit ruled in Mauro. Thus, the Second Circuit did not have the issue presented to them at the time of each decision, nor does either opinion discuss the issue.

Finally, Ms. Herman indicates that this case is different from Mauro and is not dependent upon it. In particular, she asserts that since a detainer was filed against Enright, but not against the defendants in Mauro, this case is controlled by Ford irrespective of the validity or the applicability of Mauro. This argument ignores both the structure of the Interstate Agreement on Detainers and the Ford decision. Under Article IV of the Agreement, the determination that a writ of habeas corpus ad prosequendum is a "detainer" is a necessary

but not a sufficient condition to the applicability of the provisions upon which Enright relies. Art. IV(a) states that the receiving jurisdiction "shall be entitled to have a prisoner against whom he has lodged a detainer . . . ." The same sentence, however, then further conditions availability upon the "presentation of a written request for temporary custody. . . ." It is thus clear that in order for Art. IV to apply to Enright, a writ of habeas corpus must be deemed to be both a "detainer" and a "request", especially since the requirements of Art. IV(c) apply only to a "proceeding made possible by this article," and Art. IV(e) provides for dismissal only of an indictment "contemplated hereby." Indeed, Ford -- upon which Enright relies for this point -- specifically read the Mauro decision as holding that the writ "constitutes a detainer and a request . . . within the meaning of the Act." 550 F.2d at 736 (emphasis added). In short, the applicability of the Agreement to Enright is wholly dependent upon the novel, wholly unprecedented, and as yet unfollowed* decision in Mauro that a writ is both a "detainer" and a "request."

The issue before Your Honor is of unimaginable importance, since the validity of numerous convictions between 1970 -- when the Federal Government joined the Agreement -- and 1976, when the Court reached its novel and unique decision in Mauro, hang in doubt on an issue that did not enter the minds of any of the parties at the time of the convictions, and that does not relate in any way to guilt or innocence.

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* As Your Honor knows, the Fifth Circuit has rejected the Mauro rationale. United States v. Scallion, 548 F.2d 1168 (5th Cir. 1977). On August 1, 1977, the undersigned was informed by the Office of the Solicitor General that in as yet unreported opinions, the First Circuit (United States v. Kenaan) and the Sixth Circuit (United States v. Ridgeway, decided July 13, 1977), have done so as well. I have not yet seen those decisions, but will attempt to obtain them if Your Honor so requests. In addition, this issue was argued to the Third Circuit en banc on May 2, 1977, with no decision yet. United States v. Scirell, Dkt. No. 76-1647

Thus, at present only two judges in all of the Courts of Appeals have ruled on this issue adversely to the Government.

We submit that our arguments under the Stovall test are simply unanswerable; indeed, Enright has not even argued that any other result could be reached under it.

Respectfully yours,

ROBERT B. FISKE, JR.
United States Attorney

By: _____
DENISE L. COTE
Assistant United States Attorney

cc: Susan N. Herman, Esq.
Prisoners Legal Services of New York
100 Church Street, 18th Floor
New York, N. Y. 10007

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Miss Cote

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT FILED SEP 15 1977 S.D. OF N.Y.

ROBERT J. ENRIGHT,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

77 Civ. 949
(74 Cr. 1152)
CLM

46343

A P P E A R A N C E S

Prisoners' Legal Services of New York
Attorneys for Petitioner
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New York, N. Y. 10007
Susan N. Herman
Pierce Gerety, Jr.
Of Counsel

Robert B. Fiske, Jr.
United States Attorney for the
Southern District of New York
Attorney for Respondent
1 St. Andrews Plaza
New York, N.Y. 10007
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MENZNER, D. J.:

This is a motion by the government for reargument of the court's opinion and order of July 13, 1977, on the grounds that the court did not consider whether the decision in United States v. Mauro, 544 F.2d 588 (2d Cir. 1976), petition for cert. filed, 45 U.S.L.W. 3765 (U.S. May 13, 1977) (No. 76-1596), should be given retroactive effect. This motion for reargument is granted.

The Second Circuit's decision in Mauro was one of first impression. 544 F.2d at 589. The holding of that court established for the first time the theory that the use of the writ of habeas corpus ad prosequendum (the "writ") was a detainer under the Interstate Agreement on Detainers, 18 U.S.C. App. (the "Agreement"). Mauro's progeny, United States v. Ford, 550 F.2d 732 (2d Cir. 1977), and United States v. Cyphers, 556 F.2d 630 (2d Cir. 1977), while following this theory, have not directly dealt with the issue of retroactivity.

The issue of Mauro's retroactive effect is not material in this case, however, in view of the fact that the government actually lodged a detainer against the petitioner. By reason of having lodged the detainer, the government is bound by the terms of the Agreement "whether or not a writ of habeas corpus ad prosequendum

constitutes a 'detainer' . . . ." United States v. Ford, supra at 742.

In this case, as in Ford, the government used the writ to demand that the petitioner be produced, after an actual detainer had been lodged. "[O]nce a federal detainer has been lodged against a state prisoner the habeas writ constitutes a 'written request for temporary custody' within the meaning of Article IV of the Detainer Act." United States v. Ford, supra.

The government became a party to the Agreement in 1970 when it was enacted into law by the Congress. It is clear from the terms of the Agreement that the government is a "state" bound by all the Agreement's provisions. Agreement, supra Article II(a). While an argument can be made that the government was unaware that it had to comply with the terms of the Agreement when it proceeded against a prisoner solely by the use of the writ, cf. United States v. Scallion, 548 F.2d 1168 (5th Cir. 1977), such an argument cannot successfully be made when it proceeds by actually lodging a detainer. The decision in Ford holding the writ to be a "request" under the Agreement is not a novel interpretation requiring a determination as to its retroactive effect.

Accordingly, the court adheres to the opinion and order of July 13, 1977, and the order is stayed for a period of 30 days from the date of this order. The government may file a notice of appeal within this 30-day period, should they be so advised, and should such a notice of appeal be filed, the writ shall be further stayed pending the decision on the appeal.

So ordered.

Dated: New York, N. Y.
September 14, 1977

Charles H. Tenney
U. S. D. J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

ROBERT J. ENRIGHT :

- v - :

UNITED STATES OF AMERICA :

- x

NOTICE OF APPEAL

77 Civ. 449 (CMM)

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NOTICE is hereby given that the United States of America hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, entered on September 14, 1977, granting the motion by Robert J. Enright for an order pursuant to Title 28, United States Code, Section 2255.

Dated: October 11, 1977

New York, New York

Robert B. Fiske, Jr.

ROBERT B. FISKE, JR.
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A 212

77-2048

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2048

HAROLD EDWARDS,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX
FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

RICHARD A. MESCON,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2048

HAROLD EDWARDS,
Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,
Respondent-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Harold Edwards appeals from a memorandum and order filed January 25, 1977, in the United States District Court for the Southern District of New York by the Honorable Charles M. Metzner, United States District Judge, denying Edwards' motion pursuant to Title 28, United States Code, Section 2255, seeking withdrawal of his plea of guilty, vacation of the judgment of conviction entered thereon, and dismissal of the indictment upon which his plea was premised.

Indictment 74 Cr. 592, filed on June 11, 1974, charged Harold Edwards, along with two others, with armed robbery of a bank insured by the Federal Savings and Loan Insurance Corporation. Count One charged all three defendants with bank robbery in violation of Title 18, United States Code, Sections 2113(a) and 2. Count

Two charged them with use of a firearm in connection with the robbery, in violation of Title 18, United States Code, Sections 2113(d) and 2.

On January 8, 1975, Edwards pleaded guilty to Count One of the indictment; on February 20, 1975, he was sentenced to a term of 10 years imprisonment. No appeal was taken from that conviction.

In September 1976, Edwards filed the present motion pursuant to 28 U.S.C. § 2255, making, for the first time, a claim under the Interstate Agreement on Detainers (hereinafter "the Agreement"), 18 U.S.C. App. Judge Metzner denied the motion on January 25, 1977.

Statement of Facts

On June 11, 1974, Edwards and two confederates were indicted for the May 30, 1974, armed robbery of the New York Federal Savings and Loan Association, 1270 Lexington Avenue, New York, New York. At that time a warrant was issued for his arrest. On June 27, 1974, that warrant was lodged as a detainer at the Manhattan House of Detention ("Riker's Island") where Edwards was confined at the time, awaiting trial on state charges.

On December 18, 1974, Edwards was produced in federal court pursuant to a writ of *habeas corpus ad prosequendum* ("writ") at which time an application to vacate the warrant was granted. He was returned to Riker's Island that day.* The writ was adjourned to

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* The motion filed in the District Court as well as Edwards' brief in this Court both incorrectly list this date as December 15, 1974, which was a Sunday. Both the docket sheet in the District Court and the writ itself indicate that Edwards was first brought to federal court on December 18, 1974. The docket sheet is included in the Government's appendix.

January 8, 1975 on which date Edwards was again brought before the District Court and pleaded guilty to Count One of the indictment. The writ was then adjourned to February 20, 1975, and Edwards was returned to Riker's Island. On that latter date, the defendant was once again brought to federal court and was sentenced to 10 years imprisonment.* The writ was thereupon marked satisfied.

Nineteen months later, in September 1976, Edwards filed the present motion pursuant to 28 U.S.C. § 2255, seeking to set aside and vacate his sentence, to withdraw his guilty plea and to dismiss the indictment against him. The motion was based entirely on the Agreement. Edwards argued that under this Court's decision in *United States* v. *Mauro*, 544 F.2d 588 (2d Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3765 (May 9, 1977), his transfer from state to federal custody and back again prior to his federal guilty plea violated Article IV(e) of the Agreement. On January 25, 1977, Judge Metzner denied the motion without a hearing.** Judge Metzner ruled that since Edwards had pleaded guilty to the indictment, he had waived all defects in the indictment, including any possible vulnerability to challenge under the Agreement.

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* The federal sentence was to run concurrently with a sentence imposed in state court on February 13, 1975, (that is, between the time of Edwards' guilty plea and the time of his sentence in this case) of two to four years for possession of a weapon.

** A copy of his memorandum opinion is attached to Edwards' brief on this appeal.

ARGUMENT

POINT I

The Decision of the Court in *United States v. Mauro*, 544 F.2d 588 (2d Cir. 1976), Was Incorrect.

In *United States* v. *Mauro*, 544 F.2d 588 (2d Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3765 (May 9, 1977), which the majority noted was a case "of first impression," *id.* at 589, a divided panel of this Court ruled for the first time in any Court of Appeals that, in effect, when the Government utilized the literally centuries-old writ of *habeas corpus ad prosequendum* to produce defendants in Court, it was bound by the provisions of Article IV of the Agreement, notwithstanding the fact that neither the Agreement nor its legislative history even once mentions the writ or provides for a repealer of 28 U.S.C. § 2241(c)(5). The Government submits that the decision in *Mauro* was wrong.* The arguments

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*Were this Court to overrule *Mauro*, Edwards' motion would necessarily be without merit. We recognize, of course, that this case is distinguishable from *Mauro* in one respect. In *Mauro*, no detainer was filed against the defendants. The *Mauro* majority purported to rule only that a writ is a "detainer," and did not explicitly reach the issue of whether a writ is a "request" within then meaning of Article IV. In this case, as in *United States* v. *Ford*, 550 F.2d 732 (2d Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. (July 8, 1977), a detainer was filed. Thus, based upon the language in *Ford* that "[w]hether the writ independently constitutes a detainer, therefore, is not at issue here," *id.* at 736, see also *id.* at 742, one might argue that this case is governed by *Ford* irrespective of the validity of *Mauro*.

This argument is incorrect, however, for the following reason. The characterization of a writ as a "detainer" is not a sufficient condition for the applicability of Article IV of the Agreement. Unlike Article III, which governs requests initiated by the defend-

[Footnote continued on following page]

in support of our position are generally those advanced by Judge Mansfield in his dissent in *Mauro*, 544 F.2d at 595, and we will not repeat them here. We do point out, however, that since the decision in *Mauro*, the Courts of Appeal for the First, Fifth and Sixth Circuits have considered the issue reached in *Mauro* and have each rejected the reasoning adopted in that decision. See *Ridgeway* v. *United States*, Dkt. No. 76-2145 (6th Cir. July 13, 1977); *United States* v. *Kenaan*, Dkt. No. 77-1014 (1st Cir. July 7, 1977); *United States* v. *Scallion*, 548 F.2d 1168 (5th Cir. 1977).* In short, this Court now stands absolutely alone in its interpretation of the Agreement. In view of the enormous precedential and practical significance of *Mauro* and its progeny, we respectfully urge the panel that hears this appeal to reconsider the correctness of the *Mauro* decision. See, *e.g.*, *United States* v. *Alessi*, 544 F.2d 1139, 1143-52 (2d Cir. 1976 (reconsidering *United States* v. *Beckerman*, 516 F.2d 905 (2d

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ant and is triggered solely by the pendency of a "detainer," Article IV is triggered by a "request for temporary custody or availability," which is filed by the Government. In order to reach its result that dismissal was required by Article IV(e), the majority in *Mauro* must necessarily but *sub silentio* have decided that a writ constitutes a "request;" indeed, the *Ford* panel recognized this when it read the *Mauro* decision as holding "that the writ of habeas corpus ad prosequendum constitutes a 'detainer' *and a 'request'* by a prosecuting authority within the meaning of the Act . . ." 550 F.2d at 736. (emphasis added).

Hence, if *Mauro* was wrongly decided, Article IV does not apply to Edwards; otherwise put, Edwards' position depends upon the continued vitality of *Mauro*.

* Each of these decisions rejected *Mauro* and held that a writ is not a detainer under the Agreement. The Third Circuit, in *United States* v. *Sorrell*, Dkt. No. 76-1647 (3d Cir. November 29, 1976), reached the same result reached by this Court in *Mauro*. However, that decision was vacated on January 27, 1977, and was argued before the Third Circuit *en banc* on May 2, 1977. The issue is currently also before the Ninth Circuit in *United States* v. *Adkins*, Dkt. No. 76-3526 and the Eighth Circuit in *Speed* v. *United States*, Dkt. No. 77-1126.

Cir. 1975)). Alternatively, we urge this Court to consider *en banc* the correctness of *Mauro* and its progeny. Unlike the situation in *Eisen* v. *Carlisle & Jacquelin*, 479 F.2d 1005, 1020 (2d Cir. 1973) (Kaufman, C.J.) (denying rehearing *en banc*), *aff'd*, 417 U.S. 156 (1974), were this Circuit to overrule *Mauro* and bring itself into line with the other Circuits that have ruled on the question, there is no reason to be "confident the Supreme Court will take this matter under its certiorari jurisdiction." *Id.* at 1020. Rather, were this Court to reach unanimity among the Circuits, the principal ground for a grant of certiorari, see Rule 19(1)(b) Supreme Court Rules, would no longer exist, and the Supreme Court need not hear the issue. We submit that the "exercise of sound, prudent and resourceful judicial administration," *id.* at 1021, commends this action.

POINT II

This Court's Decision in *United States* v. *Mauro* Should Not Be Applied Retroactively.

This Court in *United States* v. *Mauro*, *supra*, ruled for the first time in any court of appeals that the Agreement limited the Government's ability to procure state prisoners under a writ of *habeas corpus ad prosequendum*. Subsequently, in two decisions in which the Government's briefs were filed before the filing of the *Mauro* decision, the Court has reaffirmed its holding in *Mauro*. *United States* v. *Cyphers*, Dkt. No. 76-1131, slip op. 1737 (2d Cir., Feb. 8, 1977); *United States* v. *Ford*, *supra*, 550 F.2d at 736.* This Court has not, however, had occasion to address the fundamental issue of whether its

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* The issue of the retroactive effect of *Mauro* was raised in *United States* v. *Cumberbatch*, Dkt. No. 77-1070 (2d Cir., argued June 9, 1977), which is presently *sub judice*.

novel interpretation of the Agreement should be applied to transfers that antedated *Mauro* and that occurred at a time when literally no one ever considered that the Government's centuries-old power to proceed by a writ was somehow limited.

In numerous decisions concerning the possible retroactivity of its prior decisions, the Supreme Court has routinely granted full retroactive effect only in two situations: where the new decision relates to an "aspect of the criminal trial that substantially impairs its truth-finding function," *United States* v. *Peltier*, 422 U.S. 531, 535 (1975),* and where the conduct that is the subject of the indictment was found under the prior decision to be "constitutionally immune from punishment." ** In other situations, the Supreme Court has adopted a three-pronged test based upon (1) the purpose to be served by the new decision; (2) the extent of reliance upon the previous law by the Government; and (3) "the effect on the administration of justice of a retroactive application of the new decision." *Halliday* v. *United States*, 394 U.S. 831, 832 (1969); *Desist* v. *United States*, 394 U.S. 244, 249 (1969); *Stovall* v. *Denno*, 388 U.S. 293, 297 (1967). Each

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* See, e.g., *Hankerson* v. *North Carolina*, 45 U.S.L.W. 4717 (U.S. June 17, 1977) (*Mullaney* v. *Wilbur*, 421 U.S. 684 (1975) applied retroactively); *Ivan* v. *New York*, 407 U.S. 203 (1972) (*In re Winship*, 397 U.S. 358 (1970) applied retroactively); *McConnell* v. *Rhay*, 393 U.S. 2 (1968) (giving retroactive effect to the right to counsel provided in *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *Pickelsimer* . *Wainwright*, 375 U.S. 2 (1963) (retroactive effect of *Gideon* v. *Wainwright*, 372 U.S. 335 (1963)).

** See, e.g., *Robsinson* v. *Neil*, 409 U.S. 505 (1973) (giving retroactive effect to *Waller* v. *Florida*, 397 U.S. 387 (1970)); *United States* v. *U.S. Coin & Currency*, 401 U.S. 715 (1971) (*Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), applied retroactively). See also *United States* v. *Travers*, 514 F.2d 1171 (2d Cir. 1974).

of these factors clearly demonstrates that *Mauro* should not be applied retroactively.*

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* Most of the decisions cited in support of the three-pronged approach involved the possible retroactive application of new constitutional procedural decisions, and indeed the doctrine of prospectivity received its genesis—or at least its impetus—from the Supreme Court's early decisions involving the exclusionary rule. See e.g., *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966). Nonetheless, the retroactivity analysis of those cases is fully applicable to *Mauro*. First, the decision in *Mauro* was not simply an interpretation of the Agreement, since even if the Agreement were read to apply to the federal Government, that would not in itself deal with the problem of the Government's independent power acting under a writ. The conclusion of the *Mauro* majority limiting the Government's age-old power under a writ was based on its reasoning that "[a]ny other construction would permit the United States to evade and circumvent the Agreement." 544 F.2d at 592. This, of course, was essentially a prophylactic determination of precisely the sort to which the retroactivity analysis most directly applies, *Michigan* v. *Payne*, 412 U.S. 47, 53 (1973). At any rate, the applicability of this analysis to interpretation of statutes, even when the predicate decision did not "overrule" a prior judicial determination, was made explicitly clear by this Court's unanimous, *en banc* decision in *United States* v. *Kaylor*, 491 F.2d 1133, 1138-39 (2d Cir. 1974) (*en banc*), applying its interpretation of the Youth Corrections Act prospectively only, and specifically employing the *Desist* and *Stovall* tests. Similarly, in *Bailey* v. *Holley*, 530 F.2d 169, 172-74 (7th Cir. 1976), a defendant sought to take advantage of the Circuit's earlier decision in *King* v. *United States*, 492 F.2d 1337 (7th Cir. 1974), that section 555(e) of the Administrative Procedure Act applied to the United States Board of Parole. Acknowledging that Bailey was in precisely the same situation as King, the Court nonetheless ruled that the *King* decision would be prospectively applied only. In doing so the Court specifically rejected "petitioner's contention that the *Stovall* criteria for deciding questions of retroactivity are not applicable to decisions based on statutory construction." *Id.* at 173. See also *Mower* v. *Britton*, 504 F.2d 396, 399 (10th Cir. 1974). Other circuits have ruled similarly. See, e.g., *United States* v. *Brackett*, — F.2d —, 21 Crim. L. Rep. 2391 (D.C. Cir. July 18, 1977) (*en banc*); *Owens* v. *United States*, 383 F. Supp.

[Footnote continued on following page]

Turning first to the purpose to be served by the new decision, the purposes of the Agreement as set forth in Article I are to avoid "uncertainties which obstruct programs of prisoner treatment and rehabilitation," and to promote "the expeditious and orderly disposition" of outstanding charges and "cooperative procedures" in dealing with interjurisdictional transfer of prisoners. None of these policies, which at any rate have nothing to do with the "truth-finding process," *Gosa* v. *Mayden*, 413 U.S. 665 (1973) (plurality opinion), would be furthered by retroactive application. Edwards' "programs of prisoner treatment and rehabilitation" (if indeed he was participating in any during his pre-trial confinement at Riker's Island) were in no way hampered by his very brief visit to the federal courthouse. "Cooperative procedures" were certainly unnecessary in view of the acknowledged acquiesance of the New York state authorities in the authority of the federal writ and the efficient transfer of custody which permitted Edwards to be transferred from state to federal custody for a court appearance and returned to

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780, 785-87 (M.D. Pa. 1974), *aff'd*, 515 F.2d 507 (3rd Cir. 1975), *cert. denied*, 423 U.S. 996 (1976); and *Jackson* v. *United States*, 510 F.2d 1335 (10th Cir. 1975) (Supreme Court's interpretation of Youth Corrections Act in *Dorszynski* v. *United States*, 418 U.S. 424 (1974), to be applied prospectively only); *Krilich* v. *United States*, 502 F.2d 680, 683 (7th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975) (Prior decision holding that Special Agent's Report on tax prosecution was a "statement" under the Jencks Act to be applied prospectively only). Indeed, the Supreme Court itself has afforded prospective applicability to its prior interpretation of written law. In *McCarthy* v. *United States*, 394 U.S. 459 (1969), the Court held that in the absence of strict compliance with Rule 11 of the Federal Rules of Criminal Procedure a guilty plea must be vacated. Although, as a concurring justice noted, the decision "merely interpreted Rule 11 . . . and held that the rule must be strictly applied according to its terms," *Halliday* v. *United States*, *supra*, 394 U.S. at 834 (Harlan, *J.*, concurring, the Court held that it would be applied prospectively only, *id.* at 832-33, explicitly following the three-pronged test of *Desist* and *Stovall*.

state custody—all within a few hours. And Edwards' interest in an "expeditious and orderly" processing of his charges was surely satisfied by the unusally expeditious manner in which his particular case was handled, and in general was more than adequately protected by the Sixth Amendment and the local speedy trial rules *.

The second prong of the retroactivity test is the reliance of law enforcement authorities on prior law. It is simply incontestable that every party to Edwards' transfer from Riker's Island to Foley Square considered that the Federal Government was validly proceeding on the strength of a writ of *habeas corpus* with none of the limitations added by the Agreement. The Federal Government did not make a "request" required by the Agreement or follow any of the procedures required by the Agreement.** Indeed, our surprise at the contentions eventually adopted in *Mauro* has been self-evident. Edwards, unlike the defendants in *Mauro*, who raised the issue *promptly* and *pretrial*, never asserted any claim under, or made any mention of, the Agreement until the filing of his petition under 28 U.S.C. § 2255. In short, he simply seeks to reap a "windfall benefit," *Michigan* v.

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* The Supreme Court has noted that in determining possible retroactive effect, it will also look to whether "other safeguards are available" to protect the right asserted. *Johnson* v. *New Jersey, supra*, 384 U.S. at 728.

** For example, the parties to the Agreement have developed common forms that are required for the processing of claims under the Agreement. These standardized documents, consecutively numbered Form I through Form IX, cover all aspects of the procedures under the Agreement, from "Notice of Untried Indictment" to be sent to a prisoner (Form I) through "Prosecutor's Report on Disposition of Charges" (Form IX). During the course of Edwards' proceedings, no one ever used such a form. While we do not contend that the use of such forms is a prerequisite to assertion of rights under the Agreement, but see Article VII, their non-use, we submit, is powerful evidence that no one at that time considered that the Agreement applied.

Payne, 412 U.S. 47, 53 (1973), from a retroactive application of *Mauro*. Finally, the state of New York, even if one were to assume that it had an interest in the disposition of Edwards' petition, clearly did not consider the Federal Government limited by the Agreement, since it never once required compliance with the procedures contemplated by the Agreement.* In short, *all* parties to this matter treated the manner in which Edwards was brought to the federal courthouse as nothing more nor less than the Federal Government's exercise of its power under Title 28, United States Code, Section 2241(c)(5). Furthermore, we submit that this reliance was entirely justified. The *Mauro* court noted that its decision that the Agreement applied to the Federal Government was "one of first impression in this Court." 544 F.2d at 589.** Indeed, while the majority in *Mauro* concluded that a writ constituted a "request" under the Agreement, its principal basis for doing so—the assertion that "[a]ny other construction would permit the United States to evade and circumvent the Agreement by simply utilizing the traditional writ," 544 F. 2d at 592 (footnote omitted)—ignores the fact that the defendant under Article III(a) can *himself* trigger the applicability of the Agreement. In any event, even if the *Mauro* majority's fear of circum-

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* Those procedures include both the use of the forms described on page 10, *supra*, at ** and the 30-day opportunity of the Governor to review the "request" under Article IV(a).

** Thus, the *Mauro* decision should not be applied retroactively as are decisions that merely "clarify or extend" prior law. *Gates* v. *Henderson*, Dkt. No. 76-2065, slip op. 1345, 1349 n. 2 (2d Cir., January 12, 1977), vacated *en banc on other grounds*, slip op. 5361 (August 19, 1977); *Welcome* v. *Vincent*, 549 F.2d 853, 858 n. 3 (2d Cir. 1977); see also *Ferguson* v. *United States*, 513 F.2d 1011, 1012 (2d Cir. 1975) (Kaufman, *C.J.*). As the *Mauro* panel acknowledged, its decision was wholly unprecedented, and thus these decisions are inapplicable. Indeed, in *Ferguson* the Court noted that prospective application was appropriate for new decisions "which conflicted with well-established prior practice." *Id.* That is certainly the situation in this case.

vention were sound, prospective application of this essentially prophylactic reasoning in *Mauro* is clearly sufficient to cure any alleged ill. Finally, the *Mauro* majority's conclusion, whatever its merits, is not one that could possibly be foreseen by anyone other than the clairvoyant. There is simply *not one scrap* of explicit language or even a hint in either the text of the Agreement or the legislative history behind it that the power of the Federal Government acting under authority of writs was somehow limited.* No clearer case for reliance on prior law could be made.

Finally, of course, "the effect on the administration of justice of a retroactive application" of *Mauro* is clearest of all. It is incontestable that since the accession of the Federal Government to the Agreement in 1970 virtually no one—and certainly no one in this Circuit—asserted any rights under that Agreement with respect to the Federal Government until 1976. Prior to the *Mauro* decision, prisoners appear to have been transferred on a regular basis from state to federal custody and back without regard for the provisions of the Agreement. While there are no statistics, we submit that there are a significant number of prisoners in federal custody whose transfers both antedated the *Mauro* decision and violated the provisions of the Agreement. As word of the *Mauro* decision spreads, many prisoners fortunate enough to have been convicted in a court of the Second Circuit will raise a claim under the Agreement, either directly or, like

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* As noted at p. 5, *supra*, the First, Fifth and Sixth Circuits, the only one. that have considered the issue, have explicitly rejected *Mauro*. Moreover, prior to this Court's decision, several judges in the Southern District of New York had also rejected the reasoning of the district court opinion in *Mauro*. See *United States* v. *Brown*, — F. Supp. — 76 Cr. 244 (S.D.N.Y. July 15, 1976) (Metzner , *J.*); *United States* v. *Lee*, — F. Supp. — 76 Cr. 552 (S.D.N.Y. August 16, 1976) (Goettel, *J.*). No judge in the Southern District had agreed with Judge Bartel's decision in *Mauro* prior to its affirmance. In short, the United States Attorney has not been alone in his reading of the statute.

Edwards, under 28 U.S.C. § 2255.* This prospect is especially frightening when, as here, convictions of defendants who have pleaded guilty to serious crimes are jeopardized—over an issue that has absolutely nothing to do with guilt or innocence.

In short, under the tests developed by the Supreme Court to determine the retroactive effect of a decision, *Mauro* should be applied—if at all—prospectively only.**

POINT III

A Violation of Article IV of the Agreement Is Not Cognizable Under 18 U.S.C. Section 2255.

It is well settled that to warrant collateral review under 28 U.S.C. § 2255, the claimed error must be one of lack of jurisdiction, deprivation of a constitutional right or a fundamental defect resulting in a "complete miscarriage of justice." *Davis* v. *United States*, 417 U.S. 333, 346 (1974), quoting *Hill* v. *United States*, 368 U.S. 424, 429 (1962); see also *Alfano* v. *United States*, 555

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* This is at least the seventh case to reach this Court raising issues under the Agreement, all in the last year. *Mauro, Ford, United States* v. *Cyphers*, Dkt. No. 76-1131, slip op. 1737 (2d Cir., February 8, 1977); *United States* v. *Chico*, Dkt. No. 77-1016, slip op. 4275 (2d Cir., June 20, 1977); *United States* v. *Cumberbatch, supra;* and *United States* v. *Evans*, 555 F.2d 561 (2d Cir. 1977), *aff'g* 423 F. Supp. 528 (S.D.N.Y. 1976). See also *United States* v. *Guarino*, Dkt. No. 77-1127 (presently pending on submission). In addition, there may be appeals from other districts of which we are unaware, and a significant number of cases raising such issues are pending in the district courts.

** In *United States* v. *Kaylor, supra*, this entire Court noted "great concern lest our burdened federal court system be flooded with new motions to vacate sentences. . . ." 491 F.2d at 1138. That concern must surely arise here *a molto fortiori* when the concern is that the courts will be burdened with attempts by concededly guilty defendants seeking release, and not merely resentencing.

F. 2d 1128 (2d Cir. 1977); *United States* v. *Spada*, 331 F. 2d 995, 996 (2d Cir.), *cert. denied*, 379 U.S. 865 (1965). The facts of this case fall into none of these categories. No exceptional circumstances are presented here where "the need for [the] remedy afforded by the writ of habeas corpus is apparent." *Hill* v. *United States*, *supra*, 368 U.S. at 429.

The District Court in this case certainly had subject matter jurisdiction over Edwards' bank robbery indictment and it obtained personal jurisdiction over him on December 18, 1974, the day he was arraigned on the indictment and his bail was fixed.*

Since the District Court unquestionably had subject matter jurisdiction to accept the guilty plea and to render the judgment of conviction now being collaterally attached,** the inquiry becomes whether the claim raised a

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* Edwards' claim that the Court somehow lost personal jurisdiction over him by returning him to Riker's Island on December 18, 1974 is frivolous. The place of his incarceration in no way changed his status. Indeed, as the Supreme Court has recently reiterated, once a defendant is actually before the Court, any illegality in the manner of his being brought there will not vitiate a conviction or deprive the Court of jurisdiction. *Gerstein* v. *Pugh*, 420 U.S. 103, 119 (1975); *Frisbie* v. *Collins*, 342 U.S. 519 (1952); *Ker* v. *Illinois*, 119 U.S. 346 (1886). Moreover, any question as to personal jurisdiction was waived by Edwards guilty plea on January 8, 1975. *Bistram* v. *United States*, 253 F.2d 610 (8th Cir. 1958); *United States* v. *Rosenberg*, 195 F.2d 583 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

** While in this case Judge Metzner concluded that Edwards had waived his claims by pleading guilty, in a separate matter, also involving invocation for the first time of rights under the Agreement by means of section 2255, Judge Metzner has concluded that a section 2255 motion will lie to claim such rights when the defendant went to trial. In particular, Judge Metzner concluded that an Article IV(e) violation created a "jurisdictional defect" in the indictment, which is thus cognizable on collateral attack under *United States* v. *Loschiavo*, 531 F.2d 659, 662-63 (2d Cir. 1976). *Enright* v. *United States*, 77 Civ. 449 (S.D.N.Y.

[Footnote continued on following page]

July 15, 1977). Judge Metzner has agreed to reconsider his decision upon the filing of further papers by the Government, and the issuance of the writ has been stayed until September 1977.

At any rate, we submit that Judge Metzner's analysis of an Article IV violation as a "jurisdictional defect" is incorrect. The *Loschiavo* decision, upon which he relied, noted only that section 2255 will lie to entertain "claims based upon . . . a lack of jurisdiction, in the broad sense of the court's power to adjudicate the issues . . ." 531 F.2d at 662-63. Since the indictments in both *Enright* and this case concededly stated an offense "against the laws of the United States," then clearly the District Court had "power to adjudicate the issues" under 18 U.S.C. § 3231, regardless of the vulnerability of the indictment to attack. Indeed, as this Court has recently noted, characterizing attacks on indictments as "jurisdictional" will render the requirement that such attacks be made pre-trial "a nullity." *United States* v. *McGrath*, Dkt. No. 77-1064, slip op. 4827, 4832 n.5 (2d Cir., July 19, 1977).

This limited interpretation of the notion of "jurisdictional defect" is simply compelled by the wording of F.R. Crim. P. 12(b)(2), which provides that defenses and objections based upon defects in the indictment are waived if not made prior to trial, other than claims that "it fails to show jurisdiction in the court or to charge an offense. . . ." As commentators have noted, see Wright, *Federal Practice and Procedure*, § 193 at 404-06 (1969), this exception has been rigorously distinguished from claims that attack only the validity of the indictment. Furthermore, the decisions in *Davis* and *Loschiavo* are consistent with this position. In both cases, the offense with which the defendant was charged was no longer an offense against the laws of the United States. See also *United Stats* v. *Travers*, *supra*. *Moreover*, if the defect created by a violation of the Agreement were truly jursidictional, in the broad sense of the court's power to adjudicate, then it would not be waivable. But, as noted in *United States* v. *Ford*, *supra*:

> "This provision [Article IV(e)], however, which is intended to avoid the disruptions in a prisoner's rehabilitation occasioned by repeated transfers between jurisdictions, is thus for his benefit and is waivable." 550 F.2d at 742.

Had the defect alleged in *Ford* been truly jurisdictional, that would have ended the matter, since "the lack of jurisdiction referred to in [F.R. Crim. P. 12 (b)(2)] obviously refers to jurisdiction over subject matter, which a defendant has no power to waive." *Pon* v. *United States*, 168 F.2d 373, 374 (1st Cir. 1948).

substantial constitutional issue. The answer, clearly, is that it did not. A violation of Article IV(e) does not involve a substantial constitutional issue, or indeed *any* constitutional issue. The right is merely a statutory one, having no constitutional derivation or nexus. Specifically, Edwards made no showing and, indeed, could have made no showing) of prejudice to or loss of any rights under the Fifth or Fourteenth Amendments. Rather, his best interests as a state prisoner were clearly and carefully safe-guarded. He was permitted to continue in whatever programs may have been conducted by the state institution, and suffered no hardship in traveling due to the close proximity of the federal courthouse. In short, his "return" to state custody did not "significantly impede the development of a coherent program for the prisoner's punishment and rehabilitation." *United States* v. *Ford*, 550 F. 2d at 739. Rather, it furthered that goal.*

Finally, any claim that there was a "fundamental defect which inherently results in a complete miscarriage of justice," *Davis* v. *United States*, *supra*, must also fail. While this Court has held collateral relief warranted as a result of an intervening change in law regarding the underlying offense, *United States* v. *Loschiavo*, *supra*; see also, *United States* v. *Travers*, *supra*; *United States* v. *Liguori*, 430 F.2d 842 (2d Cir. 1970), *cert. denied*,

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* Edwards makes no claim that his rights under Article IV(c) of the Agreement were violated or, that he was denied a speedy trial. Indeed, his case was disposed of swiftly, well within the structures of *Barker* v. *Wingo*, 407 U.S. 514 (1972), the local speedy trial rules then in effect (the Government filed its Notice of Readiness for Trial on December 18, 1974, the day of Edwards' arraignment), and the 120-day period provided for in Article IV(c) of the Agreement.

402 U.S. 948 (1971), under none of these decisions, or under *Davis*, is Edwards entitled to relief.*

This Court's decision in *Mauro*, even if considered an intervening change in law, does not result in imprisoning Edwards for "something that was not a criminal offense," 531 F. 2d at 665. His conduct constitutes a federal criminal offense despite the interpretation given to the Agreement by the *Mauro* panel. Accordingly, there would be no miscarriage of justice in denying collateral relief under Section 2255. *Hill* v. *United States*, *supra*.

Two recent decisions of this Court demonstrate the limited availability of relief under Section 2255, as opposed to direct review. In *Del Vecchio* v. *United States*, Dkt. No. 76-2165, slip op. 3719 (2d Cir., May 24, 1977), this Court considered whether Section 2255 affords relief to a defendant who attacked his guilty plea because of a technical failure to comply with the provisions of Rule 11 of the Federal Rules of Criminal Procedure. The Court held that in spite of the District Court's failure to advise Del Vecchio of his ineligibility for parole in the event of conviction,—which would automatically render his plea vulnerable on direct review under *Michel* v. *United States*, 507 F.2d 461 (2d Cir. 1974)—his conviction would not be set aside on collateral attack. After a thorough review

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* In both *Davis* and *Loschiavo*, the concern was with a change in the law subsequent to the affirmance of the respective convictions which, if available to Davis and Loschiavo, would have completely exonerated them. For example, the intervening change in law meant the Loschiavo "was being imprisoned for something that was not a federal criminal offense." 531 F.2d at 665. In *Davis*, due to the intervening change in the law it was possible, if his contention was correct, that his "conviction and punishment are for an act that the law does not make criminal." 417 U.S. at 346. These were truly situations which would inherently result "in a complete miscarriage of justice." Similarly, in *Travers*, the conduct of which Travers stood convicted no longer constituted a federal offense.

of the standard to be applied in Section 2255 cases under *Davis*, the Court concluded that to obtain relief under Section 2255 for noncompliance with Rule 11 in the making of the plea "a defendant must at least show prejudice affecting the fairness of the proceedings or the voluntariness of the plea." Slip op. at 3728.

Similarly, in *Alfano* v. *United States*, *supra*, the Court held that Section 2255 relief would not be granted to set aside a conviction for failure to comply with the rule enunciated in *United States* v. *Giyante*, 531 F.2d 502 (2d Cir. 1976), that a violation of the sealing requirements of 18 U.S.C. § 2518(8)(a) automatically requires suppression, even absent any claim of tampering. The Court, quoting *Stone* v. *Powell*, 428 U.S. 465, 477 n. 10 (1976), again set forth the standard to be applied in determining whether an error of law may be raised in a Section 2255 proceeding.

> The writ of habeas corpus and its federal counterpart 28 U.S.C. § 2255, "will not be allowed to do service for an appeal." *Sunal* v. *Large*, 332 U.S. 174, 178 (1947). For this reason, nonconstitutional claims that could have been raised on appeal, but were not, may not be asserted in collateral proceedings. *Id.*, at 178-179; *Davis* v. *United States*, 417 U.S. 333, 345-346 and n. 15 (1974). Even those nonconstitutional claims that could not have been asserted on direct appeal can be raised on collateral review only if the alleged error constituted "' a fundamental defect which inherently results in a complete miscarriage of justice,'" *id.*, at 346, quoting *Hill* v. *United States*, 368 U.S. 424, 428, (1962).

555 F.2d at 1130. It then ruled that unlike the "automatic" rule that applies on direct review, when proceeding by a § 2255 motion a defendant must show actual prejudice. *Id.* Edwards, of course, has not come close to meeting this exacting standard. Edwards was neither

prejudiced by his return to state custody, nor was the integrity of the fact finding process affected by his transfer. He entered a plea of guilty, and was sentenced on that plea. Now, belatedly asserting a claim of procedural error, he is neither protesting his innocence, nor claiming any deprivation of due process in determining his guilt, and he does not and cannot allege any actual prejudice. Indeed, in this respect his claims are far weaker than those found insufficient in *Del Vecchio* and *Alfano*. Surely, without more, a claim such as this does not merit review under 28 U.S.C. § 2255.*

POINT IV

Edwards' Plea of Guilty Waived Whatever Rights He Otherwise Might Have Had Under the Agreement.

The law is clear that "a plea of guilty to an indictment is an admission of guilt and a waiver of all non-jurisdictional defects." *United States* v. *Spada*, *supra*, 331 F.2d at 996. See generally *Weisser* v. *Ciccone*, 532

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* This Court's decision in *United States* v. *Cyphers*, Dkt. No. 76-1131, slip. op. 1737 (2d Cir., February 8, 1977), does not require a different result. In *Cyphers*, a divided Court held that a claim under Article IV(e) of the Agreement could be raised, for the first time, on direct appeal of a conviction. While the Government continues to believe that the *Cyphers* decision (in which the Solicitor General has determined to seek *certiorari* and will shortly file a petition in the Supreme Court) is wholly inconsistent with *Davis* v. *United States*, 411 U.S. 233 (1973), it is nevertheless distinguishable, since the question of whether relief could be obtained under 28 U.S.C. § 2255 was neither posed nor considered. By way of analogy, in *United States* v. *Journet*, 544 F.2d 633 (2d Cir. 1976), this Court held that any violation of F.R. Crim. P. 11 rendered a guilty plea vulnerable to attack on direct appeal, even though the defendant never raised the issue in the District Court. In contrast as we have discussed, similar claims were found insufficient on collateral attack in *Del Vecchio* v. *United States*, *supra*.

F.2d 101, 104 (8th Cir. 1976); *Traber* v. *United States*, 466 F.2d 483 (5th Cir.) (Per Curiam), *cert. denied*, 409 U.S. 1044 (1972); *Rice* v. *Beto*, 420 F.2d 863, 865 (5th Cir. 1969), *cert, denied*, 398 U.S. 910 (1970); *United States* v. *Donohoe*, 458 F.2d 237, 239, n. 3 (10th Cir.), *cert. denied*, 409 U.S. 865 (1972); *LaFever* v. *United States*, 257 F.2d 271, 272 (7th Cir. 1958); *Simmons* v. *United States*, 354 F. Supp. 1383, 1388-89 (N.D.N.Y. 1973). It is equally clear that jurisdictional defects, that is, defects in the Court's subject matter jurisdiction, 8 Moore's Federal Practice ¶ 11.02[2][a] (Cipes ed.), cannot be waived.

In *United States* v. *Ford*, *supra*, this Court considered whether a claimed right to a dismissal of an indictment on the basis of an alleged return to state custody in violation of Article IV(e) was waivable. In holding that the claim was waived Judge Mansfield explained.

> "This provision, however, which is intended to avoid the disruptions in a prisoner's rehabilitation occasioned by repeated transfers between jurisdictions, is thus for his benefit and is waivable."

550 F.2d at 742. Had the defect alleged in *Ford* been jurisdictional "in the broad sense of the court's power to adjudicate," *United States* v. *Loschiavo*, *supra*, 531 F.2d at 662-63 it could not have been waived, and there would have been no need for the Court to go on to consider the additional claims made under Article IV(c) of the Agreement. *Ford*, therefore, clearly demonstrates that a violation of Article IV(e) does not deprive the Court of subject matter jurisdiction.*

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* Edwards characterizes his challenge as relating to the District Court's personal jurisdiction over him after he returned to

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The remaining question here too, then, is whether there was another kind of defect based on the Agreement so serious as to require vacation of a guilty plea, long after it was made. Judge Metzner concluded that there was not; in this he was clearly correct.

In particular, Edwards' argument that his failure to fully understand the application of the Agreement to his case undercut the voluntariness of his plea is simply not correct. The rule that a plea must be intelligently made to be valid does not mean that a plea is vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. When the defendant waives his remedies and admits his guilt, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. *Brady* v. *United States*, 397 U.S. 742, 757 (1970); *McMann* v. *Richardson*, 397 U.S. 759, 774 (1970); *Parker* v. *North Carolina*, 397 U.S. 790 (1970);* see also *Santana* v. *United States*, 477 F.2d 721 (2d Cir. 1973).

Riker's Island on December 18, 1974. But as noted, p. 14 *supra* at *, his claim is not only incorrect as a matter of law, but is precisely the species as claim that has been held to be waived by the entry of a guilty plea. *Bistram* v. *United States, supra; United States* v. *Rosenberg, supra.*

* *Parker* v. *North Carolina* directly controls this case. There, a defendant attempted to demonstrate after his plea of guilty that the grand jury that indicted him had been unconstitutionally composed. Although, had he been correct, the indictment would have been a nullity, the Supreme Court held that his plea of guilty barred any subsequent challenge to the validity of the indictment. 397 U.S. at 798-99. This holding was reaffirmed and extended in *Tollett* v. *Henderson*, 411 U.S. 258 (1973), in which the Court held that a guilty plea barred an attack on grand jury composition even where the unconstitutional composition of the grand jury was conceded, *id.* at 259, and where the defendant was never aware of either those facts or his rights and thus could not make a "knowing and intelligent waiver." *Id.* at 266-67.

Edwards should have asserted his claim under the Agreement during the period prior to the date of his guilty plea. Having failed to raise an issue which this Court has determined to be waivable, he is bound by that waiver.

POINT V

United States v. Mauro Does Not Compel Dismissal of the Indictment in This Case.

Even assuming the continued vitality of *Mauro* and its retroactive application to a case involving collateral attack of a guilty plea, the Agreement does not require the dismissal of the indictment in this case. Edwards alleges that he was taken to federal court in Foley Square from Riker's Island pursuant to a writ on three occasions—for arraignment, plea and sentence.* In each case he was promptly returned to Riker's Island. This case, therefore, falls squarely within the exception to *Mauro* noted by *United States* v. *Chico*, Dkt. No. 77-1016, slip op. 4275 (2d Cir., June 20, 1977) which applies in cases where "a prisoner is removed from the prison of a state for a few hours to be arraigned, plead and be sentenced in the federal court without ever being held at any place of imprisonment other than that of the sending state and without interruption of his rehabilitation there." Slip op. at 4280. In addition, it appears from the record that on the two occasions that Edwards alleges he was returned to Riker's Island prior to the imposition of sentence on the federal charge (December 18, 1974 and January 8, 1975) he was being held there awaiting trial and was not "serving a term of imprisonment." It is only when the de-

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* Though Edwards does not make the allegation, the record of the District Court proceedings in 74 Cr. 592 discloses that Edwards was also brought from Riker's Island on December 23,

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fendant against whom a detainer is lodged is serving such a sentence that Article IV of the Agreement is triggered, and only under those circumstances that he is entitled to the benefit of its provisions. *United States* v. *Roberts*, 548 F.2d 665, 670 (6th Cir. 1977).

A. Edwards' Brief Appearances in Federal Court for Arraignment, Plea and Sentence, While an Inmate At Riker's Island, Are Not Substantial Enough to Invoke the Terms of the Agreement

In *United States* v. *Chico*, Dkt. No. 77-1016, slip. op. 4275 (2d Cir., June 20, 1977), this Court held that Article IV(e) of the Agreement does not apply in cases where a prisoner is removed from a state institution and returned after a few hours, without being held at any other place of imprisonment.

At the time the defendants in *Chico* were indicted in the District of Connecticut, they were confined in Connecticut state prisons as a result of felony convictions. On three separate occasions, they were brought to federal court pursuant to a writ—for arraignment, for entry of a plea of guilty, and for sentence. After each court appearance they were returned to the same state prisons from which they had been taken. Judge Mansfield, writing for a unanimous panel, concluded that the purposes of the Agreement would not be furthered by applying Article IV in that case because (1) the defendants were never imprisoned by the federal government; (2) their rehabilitation programs at the state penal institution were not interrupted by any other imprisonment; and

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1974, for the purpose of conferring with his attorney. This additional trip, presumably made at the request of either Edwards or his attorney, does not alter the *de minimus* nature of Edwards' periods of federal custody or affect the application of *Chico* to this case.

(3) the speedy trial objectives of the Agreement were satisfied since the defendants entered guilty pleas within 120 days following their removal to face the federal charges. Slip op. at 4279-80.

Similarly, in this case, Article IV(e) of the Agreement does not apply. Edwards was confined at Riker's Island throughout the pendency of the federal charges against him;* any rehabilitation program available to Edwards at Riker's Island was not interrupted by a period of federal imprisonment; Edwards' pleaded guilty within three weeks of first being brought to federal court to answer the federal charge. This case is thus in all material respects identical to *Chico*. The decision of the District Court should thus be affirmed on the authority of that recent decision.

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* Edwards' brief in this Court states (p. 2) that "Appellant remained in custody of the State of New York and on *December 15, 1974* [sic] was brought to the United States District Court for the Southern District of New York by a writ of habeas corpus ad prosequendum for the setting of bail, and returned to the State's custody at Riker's Island the same day." (Emphasis in the original). The record is less precise as to whether Edwards was returned to Riker's Island on January 8, 1975, after entry of his guilty plea. His brief in this Court merely states "On *January 8, 1975*, the Appellant was once again produced at the United States Courthouse Foley Square by writ of habeas corpus for plea and arraignment from the State's custody and again returned to the custody of the State of New York at Riker's Island." (Emphasis in the original). This language of course suggests that Edwards was both produced *and* returned on January 8. In any event, the sanctions of Article IV(e) only apply if "trial is not had on any indictment . . . prior to the prisoner's being returned to the original place of imprisonment" Since a plea of guilty is the equivalent of a conviction after trial, a return of Edwards to the custody of New York State after entry of a guilty plea neither violates Article IV(e) nor requires imposition of its sanctions.

B. Edwards Was Not "Serving a Term of Imprisonment" At the Time He Was Returned to State Custody and Is Therefore Not Entitled to the Benefits Conferred by Article IV of the Agreement

It appears from the record that on December 18, 1974, when Edwards was returned to Riker's Island after his arraignment and the setting of bail, he was not serving a term of imprisonment, but was being detained at Riker's Island pending disposition of state charges against him. It was not until February 13, 1975, after the entry of his guilty plea on the federal charge, that Edwards was sentenced in state court and began serving a term of imprisonment. It was, therefore, only at that time, if at all, that the provisions of Article IV(e) of the Agreement become applicable to him. Since it cannot be disputed that there was no violation of Article IV(e) by the Government at any time *after* February 13, Edwards' claim under that Article must be rejected.*

This issue was recently decided by the Sixth Circuit in *United States* v. *Roberts*, 548 F.2d 665 (6th Cir. 1977). In that case, the defendant was being held at the Queens

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* The record is not entirely clear on the question of whether Edwards was serving a term of imprisonment at Riker's Island prior to February 13, 1975. The entry in the district court docket sheet quoted in appellant's brief, as well as the state practice of lodging prisoners at Riker's Island who are awaiting disposition of their cases, suggest that he was not serving a prison sentence prior to February 13. This conclusion is bolstered by the fact that the federal indictment charged Edwards with committing the bank robbery on or about May 30, 1974 and Edwards' brief in this Court states that he was not arrested by the state authorities until June 28, 1974. Finally, it is of course incumbent upon Edwards to come forward with facts sufficient to establish his right to the protection afforded by the Agreement. *United States* v. *Culotta*, 413 F.2d 1343, 1345 (2d Cir.), *cert. denied*, 396 U.S. 1019 (1969). Having failed to do so, his petition was insufficient and was properly denied.

House of Detention on a pending New York state charge at the time he was brought to the Western District of Michigan for arraignment on the federal charge. He was returned to his original place of confinement without being tried on the federal charge. The Court concluded that the purpose of the Agreement would not be furthered by applying it in the circumstances of that case even though (1) the defendant was given credit for time served against the state sentence that was eventually imposed; and (2) he was actually engaged in a program of rehabilitation at the detention center. In reaching this result, the Court relied on the fact that any rehabilitation program would, of necessity, be dropped at the time the defendant was transferred to a permanent facility. 548 F.2d at 670.

This interpretation is also compelled by the language of Article III of the Agreement, which permits a defendant who "has entered upon a term of imprisonment" and against whom a detainer has been lodged to demand a trial within 180 days. A construction of the Agreement that applied this provision to a defendant who was merely awaiting trial in the sending jurisdiction might disrupt a planned trial or other pretrial proceedings in that jurisdiction.*

Moreover, as noted by the *Roberts* court, "the Uniform Criminal Extradition Act, which was adopted by many jurisdictions prior to promulgation of the Interstate Agreement on Detainers, contains express provisions for transfer for the purpose of criminal proceedings in another state of persons imprisoned while awaiting trial.

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* Both Article III and Article IV contain the same phrase, "term of imprisonment," to describe the status of defendants to whom they apply. It is, therefore, appropriate to look to Article III for guidance in interpreting the provisions of Article IV.

See Uniform Criminal Extradition Act §§ 5 and 18." 548 F.2d at 671.

For these reasons, this Court should follow the decision of the Sixth Circuit and conclude that the Agreement does not apply to defendants who, like Edwards, were merely awaiting trial in the sending state.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for the United States of America.

RICHARD A. MESCON,
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Assistant United States Attorneys, Of Counsel.

APPENDIX

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES

—VS.—

EUGENE QUEEN	8/ 1/74
DAVID RAGLAND	8/ 1/75
HAROLD EDWARDS	2/20/75

Docket Entries

Date *Proceedings*

6-11-74—Filed indictment.

6-13-74—Deft. Queen: Produced on a Writ (Atty Present) pleads N/G. 10 days for motions. Bail con't as previously fixed by the Magistrate at $50,000 cash. Deft. remanded in Lieu of bail. Writ satisfied.
Deft. Ragland: Produced on Writ (no atty). Court directs a N/G plea be entered. 10 days for motions. Bail con't as previously fixed by the Magistrate at $50,000 cash. Deft. remanded in Lieu of bail. Writ satisfied. Knapp, J. Assigned to Judge Metzner for all purposes.

6-24-74—EDWARDS—Deft. not present (no atty.) Court directs a plea of Not Guilty to be and Bench Warrant ordered. Referred to METZNER, J.—KNAPP, J.

6-24-74—Bench Warrant Issued

6-28-74—Suppression hearing held as to defendants QUEEN and RAGLAND. Motion to suppress denied.

Docket Entries

Date	*Proceedings*
	QUEEN and RAGLAND—defts' present with their Attorneys. Both defts' withdraw their plea of not guilty and both plead guilty to count 1. Plea accepted. P.S.I. ordered. Sentence August 1, 1974. Bail conditions as set by the Magistrate are continued. Defendant's remanded in lieu of bail.—Metzner, J.
Aug. 1-74	—EUGENE QUEEN—Filed Judgment that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS on count ONE (1). Count 2 is dismissed on motion of defendants' counsel with the consent of the Government.—Metzner, J. copies issued.
Aug. 1-74	—DAVID RAGLAND—Filed judgment that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of SEVEN (7) YEARS on count (1) ONE. Count 2 is dismissed on motion of defendant's counsel with the consent of the Government.—Metzner, J. copies issued.
Aug. 7-74	—EUGENE QUEEN—Filed C.J.A. copy #2 —original copy appointing Allen Stim, Esqs. as Attorney, mailed to A.O., Wash., D.C. for payment.
Aug. 15-73	—QUEEN—Filed letter of deft. with memo endorsed: The attached letter will be treated as a motion to reduce sentence. The motion is denied since the Court is of the opinion

Docket Entries

Date	*Proceedings*
	that the earliest date for consideration of parole should not occur until the defendant has served 1/3 of the sentence. The crime involved was robbery of a bank in which a gun was used. So ordered.—Metzner, J. m/n by pro se clerk. England
8- -74	—Filed Transcript of record of proceedings, acted for Def. 8-1-74
8-14-74	—QUEEN—Filed Remand with Marshal's return 6/13/74
8-14-74	—RAGLAND—Filed Remand with Marshal's return 6/13/74
9-16-74	—QUEEN—Filed commitment & entered, Deft delivered to
10- 2-74	—RAGLAND—Filed the following documents received from Mag. Raby, Docket Entry Sheet; Criminal complaint; disposition sheet appointments of counsel; temporary commitment
10-28-74	—EDWARD, HAROLD—Closed Statistically because deft. is a Fugitive
11-12-73	—HAROLD EDWARDS—Filed Affidavit for Habeas Corpus Ad Prosequendum
12-18-74	—The defendant HAROLD EDWARDS with his atty. and the AUSA present. The defendant being produced on a writ of H/C. This matter is adjourned to 1/8/75 at 4:30 P.M. Writ adjourned to 1/8/75. Application to vacate bench warrant granted—METZNER, J.

Docket Entries

Date	*Proceedings*
12-18-74	Filed Notice of Readiness for trial
12-20-74	EDWARDS—Filed Affidavit for Writ of Habeas Corpus Ad Prosequendum
Dec. 27-74	Filed writ of habeas corpus to produce deft. HAROLD EDWARDS from Rikers Island on Dec. 23, 1974 to this courthouse. Clerk—Carter, J.
Dec. 27-74	Filed writ of habeas corpus to produce deft. HAROLD EDWARDS from Rikers Island on Dec. 18, 1974 to this courthouse. Writ adj. to Jan. 8, 1975. Metzner, J.
01-08-75	HAROLD EDWARDS—(atty. present)—deft. produced on a w/h/c (AUSA present) withdraws plea of not guilty and pleads GUILTY to count 1. Plea accepted. P.S.R. ordered. Sentence adj. to Feb. 20, 1975. Writ Adj. to Feb. 20, 1975, Metzner, J.
01-14-75	Filed the following papers received from Mag. Raby's office: docket entry sheet, criminal complaint, indictment warrant, SDNY, disposition sheet and appointment of counsel.
02-20-75	HAROLD EDWARDS—Filed JUDGMENT (atty. Edward Panzer, present)—the deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of TEN (10) YEARS on count 1. It is recommended that the Atty. General pursuant to Section 4082 of Title 18, USC, arrange to have this sentence served concurrently with the sen-

Docket Entries

Date	*Proceedings*
	tence the deft. is presently serving which sentence was imposed on Feb. 13, 1975, in the New York State Criminal Court, in so far as the time that can be served concurrently can be served. If the Atty. General agrees with this recommendation the balance of this sentence if any, will be served in a Federal Institution to be designated by him. Count TWO (2) is dismissed on motion of the defts. counsel with writ satisfied. Metzner, J. (copies issued)
03-11-75	—HAROLD EDWARDS—Filed CJA copy #2 appointing Edward Panzer of 299 Bdwy. as defts. atty. original mailed to AO, Washington, DC.
3-75	—H. Edward—Filed commitment & entered return, Deft. delivered copy to Warden of Clinton Correc. Facility at Dannemora, N.Y.
04-03-75	—Filed govts. w/h/c as to deft. HAROLD EDWARDS to have him appear on Jan. 8, 1975. Writ satisfied on 2/20/75. Metzner, J.
05-19-75	—QUEEN—Filed the following papers recd. from Mag. Raby's Office: docket entry sheet, criminal complaint, SDNY, disposition sheet, appointment of counsel and temporary commitment.

★ U. S. Government Printing Office 1977— 714—059—700